[Contractor] points to subsection H.X[2] of the contract which states "if administrative leave is granted to contractor personnel as a result of conditions stipulated in any 'Excusable Delays' clause of this contract, it will be without loss to the contractor."

The contracting officer issued a final decision denying [Contractor]'s claim. Appellant's Notice of Appeal, Contracting Officer's Final Decision. The contracting officer emphasizes several clauses which put the risk of changed security conditions on the contractor, rather than the Government. *Id.* at 2. The contracting officer points to FAR 52.225-19, which provides that "Contract performance may require work in dangerous or austere conditions. Except as otherwise provided in the contract, the Contractor accepts the risks associated with required contract performance in such operations." The contracting officer asserts that the claim should be properly analyzed under the Suspension of Work clause, FAR 52.242-14, which would entitle the contractor to an adjustment for unreasonable delays caused by the Government. In addition, the contracting officer found that, even if [Contractor] were entitled to costs, its claimed damages were calculated inaccurately. Contracting Officer's Final Decision at 3. This memorandum does not address the issue of cost calculation.

Discussion

[Contractor] asserts that the claim should be analyzed under the Excusable Delays and Administrative Leave clauses, which could potentially lead to contractor recovery of direct and indirect costs related to the granting of administrative leave. Conversely, the agency argues that the claim should be analyzed under the Suspension of Work clause, which would entitle the contractor to time, not money. As further explained below, the Excusable Delays and Administrative Leave clauses provide no basis for recovery because there was no constructive acceleration nor any granting of administrative leave. Under the Suspension of Work clause, [Contractor] also likely cannot recover because there was no unreasonable delay caused by the Government.

As an initial matter, [Contractor] argues that the e-mail conversation between [Contractor]'s project manager and the COR guarantees the contractor's recovery. Generally, the Government is only bound by actual authority and not apparent authority. *See HTC Industries, Inc.*, ASBCA 40562, 93-1 BCA ¶ 40,562 (Oct. 30, 1992). (contractor denied recovery where the contracting officer's technical representative acted outside of their actual authority). As stated above, [Contractor] acknowledged the COR's guidance to close the site at 11:00 and responded "[Contractor] reserves it right to claim ½ day of

[2] Contract clauses have been replaced with fictitious pseudonyms to preserve confidentiality.

lost time due to civil unrest." Reference 02. The COR replied "it is your right in accordance with the contract." Reference 02. It is not clear that the e-mail correspondence supports the interpretation that [Contractor] is asserting. Rather, as the contracting officer's final decision describes, the e-mail conversation seems to logically imply that [Contractor] reserved its right under the contract to file a claim for additional time. Contracting Officer's Final Decision at 3. Regardless of the interpretation of this e-mail exchange, it is not dispositive because the language of the contract, and not the COR's interpretation, determines the contractor's entitlement. Thus, the email exchange does not provide [Contractor] with an independent basis for recovery beyond what is provided in the contract.

I. Excusable Delays and Administrative Leave Clauses

The Excusable Delays and Administrative Leave clauses do not entitle the contractor to recover any amount of money because there was no constructive acceleration or granting of administrative leave. The Excusable Delays clause provides that "the Contractor will be allowed time, not money, for excusable delays as defined in FAR 52.249-10." F.X.X. Examples of excusable delays include situations such as natural disaster and Government action:

> (1) acts of God or the public enemy; (2) acts of the United States Government in either its sovereign or contractual capacity; (3) acts of the Government of the host country in its sovereign capacity; (4) acts of another contractor in the performance of a contract with the Government; (5) fires; (6) floods; (7) epidemics; (8) quarantine restrictions; (9) strikes; (10) freight embargoes; and (11) unusually severe weather

The Excusable Delays clause provides that a travel warning or similar document will not, in itself, be sufficient to establish that a security condition prevented performance. F.X.Z.

In *Fluor Intercontinental, Inc. v. Department of State*, CBCA 1559, 13 BCA ¶ 35,334, the Board found that the contractor, which had been awarded a firm-fixed price contract to design and construct an embassy compound in Haiti, had incurred an excusable delay when an ordered departure led to delays in contract performance. Specifically, the Board found that while the security conditions themselves did not constitute a change to the contract, the ordered departure was an excusable delay. *Id*. at 173,446. The Board granted costs for constructive acceleration because the contracting officer continually denied the contractor's excusable delay claim and impressed upon the contractor the need for completion with no extension due to excusable delays. *Id*. at 173,448.

Unlike in *Fluor Intercontinental, Inc.*, here there was no ordered departure and rather the situation upon which the contractor seeks to recover is much closer to the generalized security conditions the Board declined to find as changing the contract. The security conditions described, including the security alert, are similar to the "travel warning, warden message, or similar document or communication" described in F.X.Z as insufficient to constitute an excusable delay. The contract included two clauses placing the risk of changed security conditions on the contractor. *See* H.XX.Y.Z (placing responsibility on the offeror for "visiting the project site and verifying all pertinent site conditions, including the past, current, and future security conditions"); FAR 52.225-19 (noting that "Contract performance may require working in austere conditions" and requiring that "the Contractor accept the risks associated with required contract performance in such operations.") Therefore, the deterioration in security conditions likely does not constitute an excusable delay.

Constructive acceleration requires that the contractor first be faced with an excusable delay and then the Government threaten to terminate or refuse to grant, or delay granting, a time extension. *See Intersea Research Corp*., IBCA 1675, 85-2 BCA ¶ 18,058 (finding that agency threat to terminate the contract constitutes constructive acceleration); *Fluor International, Inc.* at 173,446 (finding that delay in granting a time extension following an excusable delay constitutes constructive acceleration). Even assuming there was an excusable delay, [Contractor] has not argued that there was any threat to terminate the contract, delay in granting a time extension, or other coercion by the Government that would lead to a claim for constructive acceleration.

[Contractor] also relies upon the Administrative Leave clause, which provides that, "if administrative leave is granted to contractor personnel as a result of conditions stipulated in any 'Excusable Delays' clause of this contract, it will be without loss to the contractor." H.X.Y. The clause further states that the costs of such leave "shall be a reimbursable item of direct cost hereunder for employees whose regular time is normally charged, and a reimbursable item of indirect cost for employees whose time is normally charged indirectly in accordance with the contractor's accounting policy." Specifically, [Contractor] contends that the Government ordered the site shut-down and administrative leave in response to a security concern, which constitutes an excusable delay under F.X.X. To recover under the Administrative Leave clause, [Contractor] must show, (1) that security conditions are of the type described in the Excusable Delays clause and (2) that administrative leave was granted to contractor personnel. H.X.Y. A similar administrative clause has been interpreted in a case involving layoffs and furlough of contractor employees for a substantial period of time due to the Government's unavailability of funds. *See Raytheon STX Corp. v. Department of Commerce*, GSBCA 14926-COM, 00-1 BCA ¶ 30,632 (Oct. 28, 1999) (interpreting a similar Administrative

Leave clause in the context of a partial Government shutdown where the contractor sought layoff pay and salary costs for employees affected by the shutdown but ultimately awarding costs upon the cost-reimbursable nature of the contract).

The Government argues that contractor's employees, in working on a fixed-price construction contract, do not qualify as "assigned contractor personnel in Government facilities" under H.X.Z. Unlike the cost-reimbursable contract in *Raytheon STX Corp.*, here the workers' time is not charged to the Government, either directly or indirectly. However, this understanding would render the entire Administrative Leave clause in H.X inapplicable to the Contract and it is unclear why the Government would have included the clause in a fixed-price contract if it was completely inapplicable. Notably, the clause focuses upon "the contractor's accounting policy" rather than the Government's typical liability for paying the wages.

Assuming [Contractor] can show that there was an excusable delay, and that the Administrative Leave clause would apply to [Contractor]'s employees, the dismissal of employees for less than two full days of work as a result of security concerns likely does not constitute administrative leave. Unlike in *Raytheon*, here the employees were sent home temporarily for approximately seven to eight hours of working time as a result of deteriorating security conditions outside of the Government's control. Although the parties debate whether the termination of work was ordered by the Government or the contractor, nowhere in the claim or the contracting officer's final decision does either party address whether the Government specifically ordered that the employees be placed on administrative leave for this period. Thus, the Administrative Leave clause likely does not entitle [Contractor] to relief.

II. Suspension of Work Clause

The Suspension of Work clause is inapplicable because there was no Government-caused unreasonable delay. The Suspension of Work clause, FAR 52.242-14, provides that the contracting officer may suspend work for the convenience of the Government. If a suspension of work is of an unreasonable duration, an adjustment shall be issued for the increased cost of performance. *Id.* The clause specifically provides that no adjustment is to be made when the work is suspended by a cause other than the Government. These requirements are summarized in *P.J. Dick, Inc. v. Principi*, 324 F.3d 1364, 1375 (Fed. Cir. 2003). The Court found that must be a (1) delay of reasonable length, (2) proximately caused by the Government, (3) resulting in injury, and (4) no concurrent delay that is the fault of the contractor. *Id.*

The courts and boards have typically interpreted the first requirement regarding the reasonableness of the delay to focus upon the duration of the delay rather than the purpose of the delay. *See, e.g. BCPeabody Constructions Services Inc. v. Department of Veterans Affairs*, CBCA 5410, 18-1 BCA ¶ 37,013 (finding 179-day delay to be unreasonable); *CTA I, LLC v. Department of Veterans Affairs*, CBCA 5826 et al., 22-1 BCA ¶ 38,083 (finding 186-day delay to be unreasonable). As for the second and fourth requirements, the courts and boards have found a delay to be proximately caused by the Government's action or inaction when there is no concurrent delay that is the fault of the contractor. *See Melka Marine, Inc. v. United States*, 187 F.3d 1370 (Fed. Cir. 1999) (Government failure to obtain necessary permit); *BCPeabody Construction Services Inc*. (Government failure to prepare dining room for renovation by relocating patients); *B.V. Construction, Inc.*, ASBCA 47766, et al. 04-1 BCA ¶ 32,604 (Government failure to issue a contract modification authorizing payment for additional engineering work necessary to correct errors in Government's plans and specifications). Further, "only delay on a project's critical path results in overall delay." *CTA I, LLC*, at 184,949.

Here, the delay was not of an unreasonable duration. Unlike in *BCPeabody Construction Services, Inc.*, or *CTA I, LLC*, here the delay was less than two working days and was an appropriate response to the security conditions surrounding the worksite. In analyzing the second and fourth factors concurrently, [Contractor] has not shown that there was a Government-caused delay, rather than a delay caused by the acts of an external third-party. Unlike in *Melka Marine* where the Government failed to obtain a necessary permit, or in *BCPeabody Construction*, where the Government failed to relocate patients to allow contractor access to the worksite, here the delay was caused by the acts of third-party protestors. While the parties spend much time discussing whether the Government or the contractor ultimately determined that work should be suspended, such a determination is immaterial as to the proximate cause. Regardless of who made the ultimate decision, that decision was based upon the external actions of unaffiliated third parties who created the security concern. The contractor accepted the risk of varying security conditions and agreed with the COR that the conditions warranted temporary closure of the work-site. H.XX.Y.Z; FAR 52.225-19. *See also* Exhibit 8 (describing [Contractor]'s agreement with the Government to shut-down the site). Thus, the delays were caused by an unaffiliated third-party and [Contractor] likely cannot recover under the Suspension of Work clause because there was no unreasonable delay caused by the Government.

Questions

1. If, as the contracting officer asserts, the Administrative Leave clause (H.X(e)) is inapplicable to the contractor personnel, then why was it included in the fixed price contract?
2. How did the lack of work on these two days affect project completion time?
3. Did the contractor continue work on the morning of October 20, 2017?
4. How did the contractor calculate $XX,XXX in costs?
5. Is there any additional evidence regarding whether Government personnel ordered contractor personnel to leave?

## Applicant Details

| | |
|---|---|
| First Name | **Haley** |
| Middle Initial | **E** |
| Last Name | **Talati** |
| Citizenship Status | **U. S. Citizen** |
| Email Address | **het2117@columbia.edu** |
| Address | **Address**<br>Street<br>**425 W 121st St**<br>City<br>**New York**<br>State/Territory<br>**New York**<br>Zip<br>**10027**<br>Country<br>**United States** |
| Contact Phone Number | **2547238242** |

## Applicant Education

| | |
|---|---|
| BA/BS From | **Georgetown University** |
| Date of BA/BS | **May 2020** |
| JD/LLB From | **Columbia University School of Law**<br>**http://www.law.columbia.edu** |
| Date of JD/LLB | **May 15, 2024** |
| Class Rank | **School does not rank** |
| Law Review/Journal | **Yes** |
| Journal(s) | **Columbia Journal of Law and Social Problems** |
| Moot Court Experience | **Yes** |
| Moot Court Name(s) | **NALSA Moot Court** |

## Bar Admission

## Prior Judicial Experience

| | |
|---|---|
| Judicial Internships/ Externships | **No** |
| Post-graduate Judicial Law Clerk | **No** |

## Specialized Work Experience

## Recommenders

Francois, Deborah
deborah@shanieslaw.com
(917) 202-5794

Genty, Philip
pgenty@law.columbia.edu
212-854-3250

Emens, Elizabeth
eemens@law.columbia.edu
212-854-8879

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

**Haley Talati**
425 W 121st St. Apt. 908
New York, NY 10027
(254) 723-8242

June 12, 2023

The Honorable Jamar K. Walker
United States District Court
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a rising third-year student at Columbia Law School and am writing to apply for a 2024-2025 clerkship with your chambers. I spent my last two years of high school living in Yorktown, Virginia and would be eager to return to the area.

I have spent my time at Columbia taking every opportunity to hone my research, writing, and editing skills, which I believe would be an asset to your chambers. I am a Note Editor on the *Columbia Journal of Law & Social Problems*, where I will spend next year guiding a cohort of 2L staffers through their note-writing process while working with the Editorial Board to finalize for publication my own Note on the unworkability of traditional domicile analysis for military personnel. My work as a Fellow at the 1L Writing Center, as an editor for the NALSA Moot Court, and as a Faculty Research Assistant have provided me with valuable experience in crafting legal arguments and have helped polish my eye for detail and collaboration skills.

Enclosed please find my resume, writing sample, and transcript. Also enclosed are letters of recommendation from Professors Philip Genty and Elizabeth Emens, as well as a letter from Deborah Francois of Shanies Law Office.

Thank you for your consideration. Should you need any additional information, please do not hesitate to contact me.

Respectfully,
Haley Talati

# HALEY TALATI

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## EDUCATION

**COLUMBIA LAW SCHOOL,** New York, NY
J.D. expected May 2024
Honors: James Kent Scholar
Activities: Writing Center Fellow
NALSA Moot Court, Team Member (1L) and Editor/Coach (2L)
*Columbia Journal of Law & Social Problems*, Note Editor
Teaching Assistant: Constitutional Law, Contracts, and Legal Practice Workshop
Faculty Research Assistant
Publications: "Roadblocks to Finding Home: Traditional Domicile Analysis' Fundamental Unworkability for Military Families" (*Columbia Journal of Law & Social Problems*, forthcoming)

**GEORGETOWN UNIVERSITY,** Washington, DC
B.A., *magna cum laude*, received May 2020
Majors: Government and Theology
Minor: History
Honors: Phi Beta Kappa
Brennan Medal

## EXPERIENCE

**WEIL, GOTSHAL & MANGES LLP,** New York, NY
*Summer Associate* Summer 2023

**SHANIES LAW OFFICE,** New York, NY
*Summer Associate* Summer 2022
Performed legal research, wrote memoranda, and helped draft filings on procedural and substantive issues relevant to wrongful conviction cases. Assisted with client and witness interviews and discrete research and analytical tasks.

**COLORADO FAIR SHARE ACTION,** Denver, CO
*Campaign Associate* August – November 2020
Remotely recruited a team of volunteers who conducted hundreds of weekly phonebanking calls into their neighborhoods to drive voter turnout for local progressive candidates. Trained volunteers in phonebanking skills and data tracking. Made hundreds of non-recruitment phonebanking calls each week to discuss policy issues and ballot acquisition with local voters.

**MARCH FOR OUR LIVES,** Washington, DC
*Policy Associate* August 2019 – July 2020
Created informational resources for lobbyists and chapter members, including guides to both individual bills and the organization's comprehensive policy platform. Led advocacy groups through meetings with congressional staffers as a part of organizational lobby days to support bills promoting issues such as gun violence research funding. Participated in decision-making meetings with the rest of the national policy team to determine which bills the organization would prioritize in its lobbying efforts.

**INTERESTS:** Hiking in Ohio, watching the Dallas Cowboys, playing ukulele, feminist book club

Columbia Law School

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CLS TRANSCRIPT (Unofficial)

05/16/2023 21:37:48

Program: Juris Doctor

Haley E Talati

**Spring 2023**

| Course ID | Course Name | Instructor(s) | Points | Final Grade |
|---|---|---|---|---|
| L6238-1 | Criminal Adjudication | Shechtman, Paul | 3.0 | A- |
| L6425-1 | Federal Courts | Funk, Kellen Richard | 4.0 | A |
| L6781-1 | Moot Court Student Editor II | Bernhardt, Sophia | 2.0 | CR |
| L6685-1 | Serv-Unpaid Faculty Research Assistant | Emens, Elizabeth F. | 1.0 | A |
| L6822-1 | Teaching Fellows | Bernhardt, Sophia | 1.0 | CR |
| L6822-2 | Teaching Fellows | Emens, Elizabeth F. | 4.0 | CR |

**Total Registered Points: 15.0**

**Total Earned Points: 15.0**

**January 2023**

| Course ID | Course Name | Instructor(s) | Points | Final Grade |
|---|---|---|---|---|
| L9549-1 | S. Religious Freedom & Reproductive Rights | Schwartzman, Micah | 1.0 | CR |

**Total Registered Points: 1.0**

**Total Earned Points: 1.0**

**Fall 2022**

| Course ID | Course Name | Instructor(s) | Points | Final Grade |
|---|---|---|---|---|
| L6474-1 | Law of the Political Process | Briffault, Richard | 3.0 | B+ |
| L6169-1 | Legislation and Regulation | Bulman-Pozen, Jessica | 4.0 | A- |
| L6675-1 | Major Writing Credit | Genty, Philip M. | 0.0 | CR |
| L6681-1 | Moot Court Student Editor I | Bernhardt, Sophia | 0.0 | CR |
| L6330-1 | S. Native American Law | Benally, Precious Danielle | 2.0 | A |
| L6683-1 | Supervised Research Paper | Genty, Philip M. | 3.0 | CR |
| L6674-2 | Workshop in Briefcraft<br>[ Minor Writing Credit - Earned ] | Bernhardt, Sophia | 2.0 | CR |

**Total Registered Points: 14.0**

**Total Earned Points: 14.0**

**Spring 2022**

| Course ID | Course Name | Instructor(s) | Points | Final Grade |
|---|---|---|---|---|
| L6108-4 | Criminal Law | Seo, Sarah A. | 3.0 | B+ |
| L6121-34 | Legal Practice Workshop II | Kintz, JoAnn Lynn | 1.0 | HP |
| L6873-1 | Nalsa Moot Court | Kintz, JoAnn Lynn | 0.0 | CR |
| L6116-4 | Property | Merrill, Thomas W. | 4.0 | B+ |
| L6183-1 | The United States and the International Legal System | Waxman, Matthew C. | 3.0 | A |
| L6118-2 | Torts | Rapaczynski, Andrzej | 4.0 | A |

**Total Registered Points: 15.0**

**Total Earned Points: 15.0**

**January 2022**

| Course ID | Course Name | Instructor(s) | Points | Final Grade |
|---|---|---|---|---|
| L6130-6 | Legal Methods II: International Problem Solving | Hakimi, Monica | 1.0 | CR |

**Total Registered Points: 1.0**

**Total Earned Points: 1.0**

**Fall 2021**

| Course ID | Course Name | Instructor(s) | Points | Final Grade |
|---|---|---|---|---|
| L6101-2 | Civil Procedure | Genty, Philip M. | 4.0 | A |
| L6133-7 | Constitutional Law | Murray, Kerrel | 4.0 | A |
| L6105-4 | Contracts | Emens, Elizabeth F. | 4.0 | A |
| L6113-2 | Legal Methods | Briffault, Richard | 1.0 | CR |
| L6115-18 | Legal Practice Workshop I | Tyrrell, Kirby B; Whaley, Hunter | 2.0 | HP |

**Total Registered Points: 15.0**

**Total Earned Points: 15.0**

**Total Registered JD Program Points: 61.0**

**Total Earned JD Program Points: 61.0**

**Honors and Prizes**

| Academic Year | Honor / Prize | Award Class |
|---|---|---|
| 2021-22 | James Kent Scholar | 1L |

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write this letter to highly recommend Haley Talati for a judicial clerkship position in your chambers. I am Counsel at the public interest law firm of David B. Shanies Law Office LLC. I had the pleasure of working closely with Haley as her direct supervisor when she participated last year in my firm's summer associate program. Over the course of the two months that Haley worked with us, I was consistently impressed with her intellectual curiosity, remarkable work ethic, and professionalism. I am confident that she possesses the qualities necessary to excel as a judicial law clerk.

As a summer associate, Haley demonstrated strong legal research and writing skills and analytical abilities. One of her main assignments was to prepare a research memorandum addressing whether municipal defendants can avoid liability under Monell v. Department of Social Services, 436 U.S. 658 (1978), by arguing that the right allegedly violated was not clearly established at the time of the events. Her 21-page memorandum was thorough, cogent, and superbly written. Throughout the course of the summer, I regularly relied on Haley to conduct research on discrete legal questions that arose in our cases, including on issues concerning venue and hearsay. Her ability to quickly grasp legal concepts allowed her to produce high-quality work within tight deadlines. Indeed, by the end of the summer, Haley completed the most assignments out of all the interns.

Haley approached every assignment, no matter how large or small, with an impressive level of dedication. Whether she was drafting portions of a complaint or compiling a chart surveying types of state law claims brought in wrongful conviction cases, Haley delivered outstanding work product. She was often the first summer associate to arrive in the morning and the last to leave in the evening, and her attention to detail was unparalleled. I had full confidence that I could trust the quality of her work, and Haley made it easy to be her supervisor.

What also sets Haley apart is her insatiable intellectual curiosity. She has an inherent drive to delve deeply into legal principles and explore every nuance. Perhaps because her father was in the military and she was raised in different environments across the country, Haley is keen on seeking out new challenges and considering multiple perspectives. This was evident in the way she approached her work. For example, while working on the Monell research assignment, Haley explored additional research avenues that we had not previously considered and proposed creative ways to challenge municipal defendants' efforts to evade liability.

Finally, at a personal level, Haley is compassionate, poised, and mature beyond her years. During the summer, one of our clients was exonerated after spending nearly 27 years in prison for a crime he did not commit. Knowing that our client is an avid reader like herself, Haley spent her lunch break at the bookstore, buying books by our client's favorite authors so that she and other summer associates could assemble a care package to welcome him back home. In short, Haley was a delight to work with, and I would not hesitate to work with her again if the opportunity arose.

I recommend Haley without reservation and believe that she has the potential to be an outstanding judicial law clerk. If you require any further information or would like to discuss Haley's qualifications in more detail, please do not hesitate to contact me. Thank you for considering her application.

Respectfully,

Deborah I. Francois
Counsel
David B. Shanies Law Office LLC

Deborah Francois - deborah@shanieslaw.com - (917) 202-5794

Columbia
Law School

**Philip M. Genty**
Vice Dean for Experiential Education
Everett B. Birch Clinical Professor in
Professional Responsibility

435 West 116th Street
New York, NY 10027
T 212 854 3250 F 212 854 3554
pgenty@law.columbia.edu

June 9, 2023

Re: Haley Talati

Dear Judge:

I am writing to recommend Haley Talati, a third year student at Columbia, for a judicial clerkship. I have been privileged to work with Ms. Talati in both her first and second years.

My first opportunity to work with Ms. Talati was in my Civil Procedure course in the Fall 2021 semester. Despite the size and challenging circumstances – 145 students, all masked – she stood out in the classroom for her level of engagement and facility with the material. In our initial office meeting early in the semester, she impressed me as well with her serious sense of purpose and clear goals for her legal education and career.

Ms. Talati also did excellent work on the writing assignments I assigned during the semester, and one of hers – analyzing a personal and subject matter jurisdiction problem – was singled out by her teaching fellow for special recognition. After completing my blind grading, I was therefore pleased, but not surprised, to learn that her examination was one of the very best I had received. She earned an A for the course, one of the few I was permitted under our strict mandatory first year curve.

Ms. Talati approached me after the end of the semester to ask about being a teaching fellow in her second year, but because teaching assignments had not yet been finalized, I was unable to give her an answer. By the time I knew I would be teaching the course again and offered her a position, she had already accepted an opportunity to work with one of my colleagues. She had clearly acquired a widespread reputation for academic excellence and was very much in demand. It is one of my regrets that I lost the chance to have her in this role.

Beyond my course, Ms. Talati's academic accomplishments have been reflected in a number of ways. In both semesters of our first year writing skills course, Legal Practice Workshop, she earned a grade of High Pass, which is given to the top students in the course. She was also selected for membership on the *Columbia Journal of Law & Social Problems* and has been named a Notes Editor for her third year. In addition, for her overall academic performance in her first year, she was named a James Kent Scholar, which is the highest honor we give students annually. It is reserved for only a few students in each class. Although honors for 2022-2023 have not yet been announced, I expect that she will again earn honors for her second year.

Ms. Talati has also been a generous member of the student community. For her second year, she was selected to be a Moot Court Student Editor and a Writing Center Fellow, and in both roles she mentored other students in their writing and research.

Despite missing out on having Ms. Talati as a teaching fellow, I have had an additional opportunity to work with her. In her second year, she asked me to supervise her Note, and I eagerly agreed. As expected, it was a gratifying experience. She came to me with a fully formed plan for the Note, and in each of our meetings and email communications her research and thinking had progressed in important ways. It was a most fruitful collaboration.

Ms. Talati's Note focuses on the way the concept of "domicile" has been applied to military families, and the detrimental effects of this. As she explains in the Introduction:

> [F]or military personnel and their families, determining domicile is a complicated endeavor, and general common law principles as well as statutory reforms create more barriers to establishing and maintaining a domicile of choice than the civilian population typically faces. These barriers expose military families, especially those who relocate frequently, to increased litigation risks . . . .

Ms. Talati's interest in these issues arose from the experiences of her own military family, as well as other families they knew. In addition to her analytic strengths, she brought passion and enthusiasm to the project. Our conversations operated on two levels – we talked both about technical principles of personal and subject matter jurisdiction and also about the practical experiences of the families. Her Note has this same duality of "head" and "heart," combining a rigorous legal analysis with a clear, compelling explanation of how people's lives are affected.

Throughout the writing process, Ms. Talati engaged thoughtfully with my comments and questions and was completely open to my suggestions, though I had relatively few. As in my experiences with her in Civil Procedure, she displayed a sincere desire to learn and improve. The Note, which has been accepted for publication[1], shows complete command of the subject matter.

It is clearly and persuasively written and comprehensively researched, with meticulous attention to detail.

As with everything she does, Ms. Talati has given careful thought to her reasons for pursuing a judicial clerkship. She wants to continue to improve her legal research and writing skills and be exposed to the many different issues that arise across cases. She sees clerking as a way to be of service and to continue learning after law school.

---

[1] *Roadblocks to Finding Home: Traditional Domicile Analysis' Fundamental Unworkability for Military Families*, 57 COLUM. J. OF L. & SOC. PROBS. --- (forthcoming).

In short, Ms. Talati is superbly talented, with outstanding intellectual abilities, writing and analytic proficiency, and collaborative skills. I believe that she is an ideal clerkship candidate, and I recommend her to you with enthusiasm.

Please contact me if you need additional information.

Sincerely yours,

Philip M. Genty
Vice Dean for Experiential Education
Everett B. Birch Clinical Professor
in Professional Responsibility
212-854-3250
pgenty@law.columbia.edu

June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Ms. Haley Talati for a clerkship in your chambers. Ms. Talati is a very smart, skilled, and committed law student, who I expect will be an excellent clerk.

I know Ms. Talati in three ways: as a student in my Contracts class in Fall 2021; as my Research Assistant in Spring 2023; and as a Teaching Assistant for my Spring 2023 Contracts course. I therefore have a strong basis on which to comment on Ms. Talati's performance and prospects.

My introduction to Ms. Talati came through first-year Contracts in the Fall of 2021. The grades in that course were based primarily on a difficult anonymously graded exam, which combined multiple-choice questions and essays. Students were required to write two essays: one analyzing traditional legal problems in order to predict how a court would decide them, and a second evaluating the conceptual underpinnings of contract law and applying them to specific doctrines. The exam also required students to apply their knowledge of doctrine to solve problems on a set of challenging multiple-choice questions.

Ms. Talati earned an "A" in the course. She performed well on all segments of the exam, and her policy essay was especially strong.

Based on her excellent performance in Contracts, I invited Ms. Talati to become my Research Assistant (RA) beginning in the Spring of 2023. My RAs submit written memos to me, and they also present their findings to each other and to me in periodic RA Briefing Meetings. Ms. Talati conducted interdisciplinary research on widely varying topics related to discrimination. She wrote strong memos on these topics and presented her work effectively in the Briefing Meetings. She earned an "A" in this position.

Ms. Talati was such an excellent Contracts student that I also invited her to serve as a Teaching Assistant for my Contracts class in the Spring of 2023. The responsibilities in this role include holding TA sessions once a week to review material with students, supporting the first-year students through the transition to the first semester of law school, supporting my teaching work in and out of the classroom, and reviewing and providing feedback on the midterm exams. This is not a graded position, but my impression is that Ms. Talati did a terrific job with her TA work.

Ms. Talati has had a most impressive law school career so far, both inside and outside the classroom. During her 1L year, Ms. Talati was named a James Kent Scholar, Columbia Law School's designation of highest academic honors. She also won Columbia's NALSA Moot Court competition and best-brief award. She went on to spend her 2L year as an editor for the team, a role that involved providing feedback on team briefs as well as coaching team practices approximately twice per week. Ms. Talati also served in other 1L support roles as a 2L, including as a Teaching Assistant for two doctrinal classes, including mine, and as a Fellow at the 1L Writing Center, a position that requires earning a high pass grade in both semesters of 1L LPW. Finally, Ms. Talati is a member of the *Journal of Law and Social Problems* and will spend her 3L year guiding a group of 2L staffers through the Note-writing process. Her own Note, which explores the difficulties that military personnel and families encounter within the traditional domicile framework and the failings of existing statutory reforms, will be published in the upcoming volume of the *Journal*.

During her summers, Ms. Talati is gaining experience that builds on her already strong skill set. She spent her 1L summer as an Associate at the small civil rights firm of Shanies Law Office, which takes on a wide spread of cases but was primarily handling wrongful conviction cases during the 2022 summer. Currently, Ms. Talati is a Summer Associate at Weil, Gotshal & Manges, where she will rotate through the Litigation and Restructuring Departments.

On a personal note, I might add that Ms. Talati's ability to excel immediately in law school may derive in part from the adaptability she gained from growing up in an Air Force family. Her family moved approximately every two years—sometimes more often—until she was in college. In addition to gaining exposure and connections to many different parts of this country, Ms. Talati became accustomed to arriving in a new environment, learning what she needed to know, and gearing up to full capacity swiftly. This should prepare her well for clerking, since most clerkships involve large amounts of work over a short arc of the year, so getting up to speed quickly is an asset.

In sum, Ms. Talati is a very talented law student with an impressive track record for high-quality work. I believe she will be an excellent clerk, and I strongly recommend her to you.

Let me know if I can provide any other information. I would be happy to speak further. I am out of the office this Summer, but recommendations are a priority, and I can generally be reached through my assistant, Kiana Taghavi (ktaghavi@law.columbia.edu), or on my cell phone at 718-578-9469.

Sincerely,

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*The following writing sample is the argument section of a paper I wrote in the Fall 2022 semester for my Native American Law seminar. The paper analyzes the then-recent Ninth Circuit decision in* Apache Stronghold v. United States*, 38 F.4th 742 (9th Cir. 2022), which found that the federal government's conveyance of an Apache sacred site to a mining company that would physically destroy it did not substantially burden Apache religious practices under the Religious Freedom Restoration Act. The introductory and conclusion sections, as well as sections providing additional historical and legal background to the case, have been omitted. This argument section reflects the final draft of the paper, a previous draft of which had received extremely minimal edits from the course's professor.*

The Ninth Circuit wrongly decided *Apache Stronghold* both normatively and by any reasonable interpretation of RFRA and the relevant precedents. The majority invoked cases that are not remotely analogous to the facts of *Apache Stronghold* in a way that reflects its own misguided projection of Christian principles onto indigenous religions. Meanwhile, the Supreme Court has spent years building up impenetrable safeguards against the slightest inconveniences to Christian beliefs, while decisions like *Apache Stronghold* have relegated minority religions such as that of the Apache tribes to a place of insignificance. To prevent the exacerbation of these discriminatory trends, one of these courts must reverse *Apache Stronghold*.

*Apache Stronghold* and Other Tribal Free Exercise Cases

The *Apache Stronghold* majority asserted that *Lyng* and *Navajo Nation* are "factually and legally analogous" to each other and to this case.[1] The decision also noted that *Navajo Nation* relied in part on *Lyng*, a pre-RFRA case characterizing *Sherbert* and *Yoder* as representing the only way that plaintiffs in free exercise challenges can establish a substantial burden: showing

[1] *Apache Stronghold*, 38 F.4th at 756.

"coerc[ion] by the Government's action into violating their religious beliefs."[2] *Navajo Nation* imported the *Lyng* standard onto RFRA even though *Lyng* itself did not use the phrase "substantial burden," a discrepancy the Ninth Circuit did not find significant.[3] The majority also referenced *Lyng*'s troubling assertion that a government-imposed burden on free exercise does not trigger the compelling interest and least restrictive means requirement even when the government action would "virtually destroy the… Indians' ability to practice their religion."[4]

The majority erred in equating the facts of these two precedents with those of *Apache Stronghold*.[5] The certainty that the Resolution Copper project will utterly devastate Oak Flat is not comparable to the burdens that either *Lyng* or *Navajo Nation* considered by any reasonable standard of measurement. The road paving project at issue in *Lyng* would have created audible and visual disturbances to the environment of the religious area but would not have physically intruded on the sites of sacred rituals[6] — meanwhile, Resolution Copper intends to turn almost all of Oak Flat into a crater. The artificial snow project the Ninth Circuit evaluated in *Navajo Nation* would have put artificial snow containing 0.0001% human waste onto the sacred mountain, but left the mountain itself intact[7] — but nothing will be left of Oak Flat. While the projects considered in these two cases would certainly be harmful to tribal religious practices, they cannot be compared in good faith to the burden imposed by physically wiping out an entire religious site. Further, *Lyng*'s remarks about "virtual destruction" that *Apache Stronghold*

[2] *Id*. at 758 (quoting *Lyng*, 485 U.S. at 449).
[3] *Id*. at 755 n.8.
[4] *Id.* at 755 (quoting *Lyng*, 485 U.S. at 451).
[5] This was a relevant issue in the National Native American Law Students Association (NNALSA) Moot Court 2021-22 problem (which was based on the *Apache Stronghold* case), and my thinking about some of the arguments in this paragraph was influenced by practice rounds and discussions with the other Columbia Law School team members who worked on the RFRA question: Louis Dugre, Margaret Hassel, Rohan Naik, Kyle Oefelein, Nikolos Schillaci, Ben Smith, and Rose Wehrman.
[6] *Lyng*, 485 U.S. at 453.
[7] *Navajo Nation*, 535 F.3d at 1062-63.

emphasized so heavily were likely dicta, given that before the case reached the Supreme Court, the California Wilderness Act of 1984 had granted much of the land at issue protection from commercial activity.[8]

The at best tenuous ties between *Lyng*, *Navajo Nation*, and *Apache Stronghold* suggest that the *Apache Stronghold* majority either cannot or will not discern the nuances of how government activity burdens indigenous religious practices. These comparisons seem to implicitly rely on Christian-esque notions about the core of true religious practice being totally internal and individual. Many denominations of Christianity emphasize the idea of *sola scriptura, sola fide, sola gratia* — scripture, faith, and God's grace as "*the* basis of a Christian life."[9] The projection of these principles that underlie much of Protestant Christianity, strands of which dominate the religious demographics of the United States,[10] might explain the *Apache Stronghold* majority's failure to perceive the factual differences between burdens that completely destroy a religious site and those that do not. Oak Flat itself is the heart of the Apache religion, while no physical place occupies a comparable role for Christians. The Ga'an cannot simply move somewhere else, and the religious ceremonies are specifically linked to the physical space of Oak Flat.[11] (Yet it remains notably difficult to imagine a federal court upholding a government program that would destroy, for example, the last physically standing Baptist Church,[12] so while the Ninth Circuit's decision here may reflect a misunderstanding about the fundamental

[8] *Lyng*, 485 U.S. at 446.
[9] Else Marie Wiberg Pederson, *The Significance of the Sola Fide and the Sola Gratia in the Theology of Bernard of Clairvaux (1090-1153) and of Martin Luther (1486-1546)*, 47 CISTERCIAN STUDIES QUARTERLY 379-406, 383 (2012).
[10] Religious Landscape Study, PEW RESEARCH CENTER, https://www.pewresearch.org/religion/religious-landscape-study/ (last visited Dec. 20, 2022).
[11] Opening Brief of Plaintiff-Appellant Apache Stronghold at 2, 9, *Apache Stronghold*, 38 F.4th 742 (No. 21-15295).
[12] The Columbia Law School NNALSA Moot Court coaches proposed a similar hypothetical during 2021-22 oral argument practices.

differences between indigenous religious traditions and Christianity, it may also straightforwardly establish an inescapable double standard.)

Even if *Apache Stronghold* and *Navajo Nation* were sufficiently analogous, the Ninth Circuit misconstrued RFRA's requirements in both cases.[13] 42 U.S.C. § 2000bb(b) begins:

> The purposes of this chapter are — (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened[.][14]

The structure of the statutory text only implicates *Sherbert* and *Yoder* in "the compelling interest test" they set forth, which arises only after a court has found a substantial burden and the test's burden shifts. The statute fully separates the portions of the sentences that name the compelling interest and substantial burden components with an intervening verb clause. The text also makes no mention of *Lyng*, the case that limited the scope of the substantial burden to instances of government coercion,[15] as might be expected if RFRA adopted that framework as well. Moreover, *Sherbert* itself considered whether the government action in that case imposed "any burden" on religious free exercise,[16] which is no one's proposed standard under RFRA, so *Apache Stronghold* erred in suggesting that RFRA could have adopted the coercion-only framework from *Sherbert* and *Yoder*. The decision argued that RFRA "restored" *Sherbert* and *Yoder* themselves,[17] but the plain text of the statute only mentions the compelling interest test in relation to those cases.[18] Given this structure and context, the Ninth Circuit should have instead

[13] My thinking about some of the arguments in this paragraph, specifically the basic idea that plain meaning should control the interpretation of "substantial burden," was also influenced by NNALSA oral argument practices with the team members mentioned above.
[14] 42 U.S.C. § 2000bb(b).
[15] *See Lyng*, 485 U.S. at 450.
[16] *Sherbert*, 374 U.S. at 403.
[17] *Apache Stronghold*, 38 F.4th at 755.
[18] 42 U.S.C.A. § 2000bb(b)(1).

looked to the plain meaning of the word "substantial": "considerable in quantity; significantly great."[19] Surely the outright destruction of Oak Flat and the resulting impossibility of the tribes' continued engagement in their religious practices meet this definition.

These interpretive failures undermine the validity of this entire line of doctrine surrounding tribal free exercise challenges. The Court's callous attitude in *Lyng* reflected misunderstandings about indigenous religions just as *Apache Stronghold* did. *Lyng*, however, was a pre-RFRA case, and its reasoning should have been corrected by the statute's passage. But the problems with the majority's reasoning in *Apache Stronghold* were imported directly from *Navajo Nation*,[20] another wrongly decided case based on, this time, a misreading of the statute. The text of RFRA itself indicates that coercion is not the only way that a substantial burden can be established, so at the very least, the Ninth Circuit should have taken seriously the extent — not just the type — of the harm that the government projects in these cases threatened to impose on the affected tribes.

Instead, most notably in *Navajo Nation*, the tribes' concerns were dismissed as merely implicating individuals' "subjective spiritual experiences" about how they would perceive their sacred sites, here a mountain after it was forcibly contaminated with human waste.[21] Not only does this language yet again demonstrate the Ninth Circuit's fundamental failure to understand the differences between indigenous religions and Christianity, it also raises the question of whether the same court would truly suggest, if a government project threatened to destroy Christian places of worship, that those projects would merely be "offensive to [Christians']

[19] *Substantial*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/substantial (last visited Dec. 20, 2022).
[20] *Apache Stronghold*, 38 F.4th at 756.
[21] *Navajo Nation*, 535 F.3d at 1063.

feelings"[22] (or, even if it did, whether the court would find this to be an acceptable outcome). Intentionally or not, these cases point to a clear pattern of the courts treating free exercise claims brought by tribes unseriously, "essentially leav[ing] Native Americans with absolutely no constitutional protection against perhaps the gravest threat to their religious practices."[23]

*Apache Stronghold*'s Place Within General Free Exercise Trends

Complicating any attempt to situate a case like *Apache Stronghold* clearly within the general trends of free exercise jurisprudence is RFRA's lack of impact on the states. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court held that RFRA exceeded the scope of Congress's Fourteenth Amendment enforcement power because it restricted state action that would affect free exercise beyond what was already prohibited — in other words, RFRA attempted to substantively broaden the First Amendment protections[24] that still bind the states. This characterization of the large scope of the statute suggests that RFRA as it operates against the federal government should actually afford a greater level of protection for free exercise than the Free Exercise Clause itself, an idea supported by the Court's own recent admission that RFRA protects "far beyond what this Court has held is constitutionally required."[25]

Notably, recent Supreme Court cases seem to indicate that the Court is significantly expanding its conception of what the Free Exercise Clause protects, so states may be losing their slightly heightened layer of protection against free exercise challenges. The Court clarified the current standard in *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868 (2021). The case suggests that in free exercise challenges brought against the states, the parallel to RFRA's substantial burden test is the rule that laws that are not "neutral and generally applicable" are

[22] *Id.*
[23] *Lyng*, 485 U.S. at 457 (Brennan, J., dissenting).
[24] *See City of Boerne*, 521 U.S. at 531.
[25] Burwell v. Hobby Lobby Stores, 573 U.S. 682, 705 (2014).

subject to strict scrutiny.[26] This standard is triggered when the government "proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature."[27] Writing for the majority, Chief Justice Roberts presented an extremely broad conception of the rule, which encompasses (among other possibilities) any instance where the government retains any discretion to create exceptions under otherwise generally applicable laws, such as a "good cause" standard for prohibited individual conduct.[28] Under such a broad formulation, the Court functionally decided that "no such [generally applicable] law exists,"[29] meaning that "a single exemption to any law necessitates every religious exemption to that same law."[30] The concurring opinions also hinted that the Court's free exercise jurisprudence may continue to race in this direction: Justices Alito, Thomas, and Gorsuch would have overturned *Smith* altogether.[31]

Incidentally, this sweeping conception of the Free Exercise Clause has proven no more helpful to tribes asserting their own rights to religious freedom than RFRA. The *Apache Stronghold* plaintiffs brought a Free Exercise Clause claim as well.[32] The fatal problem here is that, technically, the transfer of Oak Flat is "perfectly universal"[33] in the way recent decisions have held the Free Exercise Clause to require. Even though the Apache tribes will be uniquely burdened, there was no specific "intent to infringe" on their religious practice,[34] and the transfer will equally prohibit any secular activity from taking place on the site without leaving room for exceptions.[35] By the Court's current standards, because by definition there can be no discretion

[26] *Fulton*, 141 S. Ct. at 1877.
[27] *Id.*
[28] *Id.*
[29] ANDREW L. SEIDEL, American Crusade: How the Supreme Court Is Weaponizing Religious Freedom 233, 1st ed. 2022.
[30] *Id.* at 170.
[31] *See Fulton*, 141 S. Ct. at 1926 (Alito, J., concurring).
[32] Complaint at 26, *Apache Stronghold*, 519 F.Supp.3d 591 (No. 2:21-CV-00050-SPL).
[33] Seidel, *supra*, at 169.
[34] *Apache Stronghold*, 38 F.4th at 770.
[35] *Id.* at 771.

to create exceptions to a comprehensive transfer of land the government owns, there would essentially be no way for a government action of this kind to violate the Free Exercise Clause, even if a minority religion is singularly and devastatingly affected. This fundamental legal mismatch highlights another way in which modern free exercise jurisprudence privileges Christians to an extreme degree while leaving members of other religions to suffer the consequences of government disregard.

The justices' individual views on the significance of free exercise protections support this idea that the current conservative majority, which has been characterized as "leading a Christian conservative revolution,"[36] will likely continue to bolster them — at least for Christian challengers. In a 2020 address at the Federalist Society's National Convention, Justice Alito complained that "religious liberty is fast becoming a disfavored right,"[37] a sentiment loudly echoed in his call to overrule *Smith* shortly thereafter.[38] Justice Thomas has spoken openly about allowing Catholic doctrine to guide his actions in what he admits is a "secular job."[39] Prior to his appointment to the Court, Chief Justice Roberts argued that separation of church and state is inherently hostile to religion and advocated for imposing Christian prayers upon children in public schools.[40] The three Trump appointees have taken even more extreme positions. Upon Justice Barrett's nomination to the Court, the Baptist Joint Committee for Religious Liberty raised concerns about her commentary that law is "but a means to an end… [of] building the

[36] Ian Millhiser, *The Supreme Court is leading a Christian conservative revolution*, WASHINGTON POST (Jan. 30, 2022), https://www.vox.com/22889417/supreme-court-religious-liberty-christian-right-revolution-amy-coney-barrett.
[37] Kalvis Golde, *At Federalist Society convention, Alito says religious liberty, gun ownership are under attack*, SCOTUSBLOG (Nov. 30, 2022), https://www.scotusblog.com/2020/11/at-federalist-society-convention-alito-says-religious-liberty-gun-ownership-are-under-attack/.
[38] *See Fulton*, 141 S. Ct. at 1926 (Alito, J., concurring).
[39] Seidel, *supra*, at 210.
[40] *Id.* at 30-32.

kingdom of God."[41] Justice Kavanaugh has praised the late Chief Justice Rehnquist specifically for "helping to dismantle the idea that 'a strict wall' separates church and state."[42] Meanwhile, Justice Gorsuch "has never voted to deny any religiously based claim."[43] The recent trends of the Court, then, are hardly surprising.

The Court's most recent decision substantively addressing the substantial burden standard took place in *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014), with Justice Alito's majority opinion providing some insight into where the Court's RFRA jurisprudence may be heading and making the *Apache Stronghold* decision even more jarring in light of how much the Court deferred to religious beliefs here. In *Hobby Lobby*, the Court considered the Patient Protection and Affordable Care Act's requirement that certain employees provide minimum health insurance coverage, including contraception coverage, to their employers or face a fine of $100 per day per affected individual.[44] The majority held that because the owners of Hobby Lobby Stores believed both that a fetus is a human and that they had to run their business according to Christian principles,[45] the contraceptive mandate and threat of a financial penalty substantially burdened their religious free exercise.[46] Unlike the Resolution Copper project, the government's actions here did not impose any physical barriers to the owners' religious practices, and they certainly did not make continuing their Christian worship impossible; instead, the law merely imposed a secular financial requirement as part of a broader economic regulatory scheme that

[41] Amanda Tyler, Holly Hollman, & Jennifer Hawks, *Letter to the Senate Judiciary Committee*, BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY (Oct. 12, 2022), https://bjconline.org/wp-content/uploads/2020/10/BJC-on-Judge-Amy-Coney-Barretts-church-state-record.pdf.
[42] Laura Meckler, *Kavanaugh record suggests he would favor religious interests in school debates*, WASHINGTON POST (Jul. 10, 2018), https://www.washingtonpost.com/local/education/kavanaugh-record-suggests-he-would-favor-religious-interests-in-school-debates/2018/07/10/a805323c-8475-11e8-8f6c-46cb43e3f306_story.html.
[43] Andrew Koppelman, *Religion and Samuel Alito's time bomb*, THE HILL (Sept. 11, 2022), https://thehill.com/opinion/judiciary/3637154-religion-and-samuel-alitos-time-bomb/.
[44] *Hobby Lobby*, 573 U.S. at 696.
[45] *Id.* at 703.
[46] *Id.* at 727.

would apply widely to many other groups.[47] But the Court rejected the argument that the connection between the threat of a fine and religious freedom was "too attenuated"[48] because the regulation implicated sincere Christian beliefs.[49] Sincere belief was enough to save Hobby Lobby's pockets — but not Oak Flat's existence.[50]

Although many of the Court's more recent free exercise cases have been Free Exercise Clause challenges brought against states, they provide additional insight into how strongly the Court values free exercise — at least for Christians — even though their doctrinal significance lies outside the bounds of RFRA. During the height of the COVID-19 pandemic, the Court in a per curiam opinion struck down state restrictions on in-person church gatherings, reasoning in part that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[51] The Court also recently held that a public high school's attempt to prevent an employee from leading public prayers after football games impermissibly attempted to "treat religious expression as second-class speech,"[52] despite evidence that his team's players felt pressure to join the prayers or risk losing playing time.[53] Finally, the Court struck down a state's decision to exclude religious schools from its tuition assistance program,[54] effectively requiring states to fund religious education. The Ninth Circuit's assertion in *Apache Stronghold* that "the government makes exercises of religion more difficult all the time"[55] seems to stand on feeble footing when Christian practices are threatened.

[47] *Id.* at 696-99.
[48] *Id.* at 725.
[49] *Id.* at 727.
[50] *Apache Stronghold*, 38 F.4th at 752.
[51] Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020) (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976)).
[52] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2425 (2022).
[53] *Kennedy*, 142 S. Ct. at 2443 (Sotomayor, J., dissenting).
[54] *See* Carson v. Makin, 142 S. Ct. 458 (2021).
[55] *Apache Stronghold*, 38 F.4th at 757.

If the Court decided to hear an *Apache Stronghold* appeal, it would seem that its own statements about religious freedom would cut strongly in favor of reversing (or upholding an en banc reversal of) the Ninth Circuit's decision, which included reasoning utterly at odds with the Supreme Court's recent treatment of free exercise claims. The cost to Apache First Amendment freedoms would exceed those of the COVID-restricted churchgoers both in severity and in duration, since the loss would be total and permanent. Further, in its efforts to protect Oak Flat, the tribes have asked for far less than the right to effectively coerce others[56] into joining their religious rituals — they only want to preserve their sacred site. And if the government cannot even withhold its own funding in a way that might hinder children's religious education, surely it would be the height of hypocrisy to allow it to actively profit from the destruction of Oak Flat.[57]

Normatively, the current inertia of the Court's free exercise decisions is deeply troubling. Too often, the legal system allows Christians to use free exercise as a pretextual justification for discrimination, perhaps most frequently against the LGBTQ community,[58] or as an excuse to force their preferred policy outcomes upon others, such as by restricting access to contraceptives.[59] But the tight grip that conservative Christianity has on the Court's majority suggests that the race to broaden free exercise principles has only just begun.[60] So if the Supreme Court is determined to remove all government barriers to any practice, however harmful to others, that Christians insist is central to their religious beliefs, it should ensure that its free exercise jurisprudence also affords protections to those minority religions whose traditions are actually under serious threat. The Ninth Circuit's callous decision in *Apache Stronghold* stands

[56] *See Kennedy*, 142 S. Ct. at 2443 (Sotomayor, J., dissenting).
[57] *Apache Stronghold*, 38 F.4th at 749.
[58] *See*, *e.g.*, *Fulton*, 141 S. Ct. 1868; Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).
[59] *See*, *e.g.*, *Hobby Lobby*, 573 U.S. 682; Little Sisters Poor Saints Peter Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020).
[60] Millhiser, *supra*.

in stark contrast to the exceptional deference that the Supreme Court has given Christian practitioners in recent years. While the Court will not stand for government regulations that so much as ask Christians to spend money in a way that they would rather not,[61] the current state of the *Apache Stronghold* case indicates that, by contrast, costing tribes entire sacred sites that are actually central to their religious traditions is permissible. If the Court wants to maintain any appearance of providing equal protection, it must reverse *Apache Stronghold* unless an en banc Ninth Circuit does so first. Even if the Ninth Circuit rules correctly in the upcoming en banc review, the Supreme Court should consider granting certiorari and affirming that decision to help ensure the future protection of indigenous sacred sites.

Potential Consequences of *Apache Stronghold*

If the Court has no qualms about denying free exercise rights to non-Christian groups, it may at least have a selfish interest in preserving its own appearances. Already, the Court faces accusations about its own eroding legitimacy following decisions that seem to prioritize the entrenchment of Christian conservatism in the legal system over any coherent judicial philosophy.[62] Public trust in the judiciary rests at an all-time low among perceptions that the Supreme Court is too politically conservative.[63] A failure to reverse *Apache Stronghold* would only contribute to this accelerating decline in legitimacy — though the same has held true of other decisions that have not given the Court pause in its race to the right.[64]

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[61] *See Hobby Lobby*, 573 U.S. 682.
[62] *See, e.g.*, Jill Filipovic, *It's time to say it: the US supreme court has become an illegitimate institution*, GUARDIAN (Jun. 25, 2022), https://www.theguardian.com/commentisfree/2022/jun/25/us-supreme-court-illegitimate-institution; Spencer Bokat-Lindell, *Is the Supreme Court Facing a Legitimacy Crisis?*, N.Y. TIMES (Jun. 29, 2022), https://www.nytimes.com/2022/06/29/opinion/supreme-court-legitimacy-crisis.html; Adam Gopnik, *Highland Park and an Illegitimate Supreme Court*, NEW YORKER (Jul. 6, 2022), https://www.newyorker.com/news/daily-comment/highland-park-and-an-illegitimate-supreme-court; Robert Barnes, *Supreme Court, dogged by questions of legitimacy, is ready to resume*, WASHINGTON POST (Sept. 29, 2022), https://www.washingtonpost.com/politics/2022/09/29/supreme-court-roberts-kagan-legitimacy/.
[63] Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historical Lows*, GALLUP (Sept. 29, 2022), https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx.
[64] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

But ultimately, the consequences of the Court's own appearances are secondary to the far more important stakes involving the status of tribal free exercise rights. The judiciary has a long history of stretching the reasoning of its precedents to more rapidly erode tribal sovereignty and other rights and has continued that tradition in recent decisions.[65] The leaps between *Lyng* (a decision largely filled with dicta), *Navajo Nation* (which purported, however erroneously, to only implicate subjective religious experiences[66]), and *Apache Stronghold* (which condones the outright physical destruction of an entire sacred site) have already been extreme. What future atrocities, in turn, would leaving *Apache Stronghold* intact enable?

In an article discussing the erosion of indigenous rights, former Associate Solicitor of the Interior Department Felix Cohen once remarked,

> [L]ike the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.[67]

Through this lens, a decision like *Apache Stronghold* would normally seem to indicate that threats to religious free exercise will soon suffer more broadly within the United States. The Supreme Court, however, has firmly put that idea to rest. Perhaps, then, the case instead signals an incoming suppression of free exercise for non-Christian groups alone. Indeed, the courts have not nearly been so generous in their treatment of Muslim individuals bringing religious liberty challenges[68] compared to cases brought by Christians. Rather than ringing in an era of rolling back protections for free exercise, the *Apache Stronghold* canary may be warning that the Court intends to impose what is effectively a religious caste system.

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[65] *See, e.g.*, Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022).
[66] *Navajo Nation*, 535 F.3d at 1063.
[67] Getches et. al., *supra*, at 7.
[68] *See, e.g.*, Dunn v. Ray, 139 S. Ct. 611 (2019); Trump v. Hawai'i, 138 S. Ct. 2392 (2018).

Finally, even these broad concerns about the wellbeing of tribal free exercise should not obscure the specific harms at issue in *Apache Stronghold*. Thus far, the legal system has failed Oak Flat. The Ninth Circuit's decision will make the continuation of Apache religious traditions outright impossible.[69] The site itself will be left in ruins.[70] If the decision is allowed to stand, the government will have yet again gotten away with a blatant attempt to sell out tribal interests in a way that the courts have clearly demonstrated they would never tolerate if Christian practices were implicated.

[69] Complaint at 28, *Apache Stronghold*, 519 F.Supp.3d 591 (No. 2:21-CV-00050-SPL).
[70] *Id.* 11.

## Applicant Details

| | |
|---|---|
| First Name | **Nicholas** |
| Last Name | **Tramposch** |
| Citizenship Status | **U. S. Citizen** |
| Email Address | **ntramposch1@pride.hofstra.edu** |
| Address | **Address**<br>**Street**<br>**77, Ellensue Dr**<br>**City**<br>**Deer Park**<br>**State/Territory**<br>**New York**<br>**Zip**<br>**11729**<br>**Country**<br>**United States** |
| Contact Phone Number | **(631) 681-0959** |

## Applicant Education

| | |
|---|---|
| BA/BS From | **Syracuse University** |
| Date of BA/BS | **May 2021** |
| JD/LLB From | **Hofstra University School of Law**<br>**http://law.hofstra.edu/home/index.html** |
| Date of JD/LLB | **May 20, 2024** |
| Class Rank | **5%** |
| Law Review/Journal | **Yes** |
| Journal(s) | **Hofstra Law Review** |
| Moot Court Experience | **Yes** |
| Moot Court Name(s) | **Hofstra Moot Court Board**<br>**Hofstra Moot Court Interscholastic Team** |

## Bar Admission

## Prior Judicial Experience

| | |
|---|---|
| Judicial Internships/ Externships | **Yes** |
| Post-graduate Judicial Law Clerk | **No** |

## Specialized Work Experience

## Recommenders

Greenwood, Daniel
Daniel.Greenwood@hofstra.edu
516-463-7013
Gundlach, Jennifer
Jennifer.Gundlach@hofstra.edu
516-463-4190
Dunbrook, Tracy
Tracy.A.Dunbrook@hofstra.edu
516-463-7302

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

# Nicholas E. Tramposch

77 Ellensue Drive, Deer Park, NY 11729 | ntramposch1@pride.hofstra.edu | (631) 681-0959


The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am writing to express my sincere interest in a judicial clerkship position in your chambers. As a rising third-year student at the Maurice A. Deane School of Law at Hofstra University, graduating in May 2024, I am eager to apply my legal writing, research, and analytical skills in service of the federal judiciary. I present herein my academic record, practical legal experience, and demonstrated ability to excel in challenging roles in hopes of encouraging your consideration of my candidacy.

I rank in the top 1.8% of my law class with a 3.87 GPA and serve as an Articles Editor for the *Hofstra Law Review*. Additionally, I have earned CALI Excellence for the Future Awards for achieving the highest scores in Torts, Property, Business Organizations, Health Law, and Biotechnology: Law, Regulation, and Ethics. This spring, I won an interscholastic moot court competition: the ABA National Appellate Advocacy Competition, Brooklyn Regional. I am a skilled legal writer and oral advocate and would be honored to apply these skills to the critical work of your chambers as a clerk.

My legal experience has proven particularly formative. I have honed my legal research and writing skills as a judicial intern to the Honorable James Wicks and the Honorable Joanna Seybert, both of the Eastern District of New York, and as a Research and Teacher's Assistant to Professors Jennifer Gundlach, Daniel Greenwood, and Ashira Ostrow. This summer, I will continue to enhance my skill set and deepen my knowledge of the practice of law as a Summer Associate in the Litigation Group at Paul, Weiss, Rifkind, Wharton & Garrison LLP. I look forward to viewing the litigation process from a firm perspective and sharpening my practical skills.

Beyond the classroom, my tenure as President of the Business Law Society and TAMID Consulting at Syracuse University, as well as my work with Tel Aviv-based startups, reflect my leadership and problem-solving capabilities. I am convinced that the combination of my academic record and practical legal experience will allow me to contribute positively to your chambers.

Since my first exposure to the federal court system last summer, I possess complete confidence that I seek to embark on my legal career supporting the federal bench as clerk, and each decision I have made during law school has been with that goal in mind. It would be an honor to do so under your mentorship. Thank you for considering my application. I would welcome the opportunity to further discuss my qualifications with you.

Respectfully,

Nicholas Tramposch

# Nicholas E. Tramposch

77 Ellensue Drive, Deer Park, NY 11729 | ntramposch1@pride.hofstra.edu | (631) 681-0959

## EDUCATION

**Maurice A. Deane School of Law at Hofstra University**, Hempstead, NY
Juris Doctor Candidate, May 2024
GPA: 3.87; Rank: 5 of 281 (Top 1.8%)
Honors: *Hofstra Law Review*, Articles Editor, Vol. 52; Dean's List (4 semesters); CALI Excellence for the Future Award (highest scoring student) in Torts, Property, and Business Organizations, Health Law, and Biotechnology: Law, Ethics, and Regulation; Champion, ABA National Appellate Advocacy Competition, Brooklyn Regional
Activities: *Pro Se* Legal Assistance Clinic (anticipated Fall 2023); President, Business Law Society; Vice President, Hofstra Dispute Resolution Society; Moot Court Board

**Syracuse University**, Syracuse, NY
Bachelor of Science in Biotechnology, Bachelor of Science in Finance, *magna cum laude*, May 2021
GPA: 3.73
Honors: Coronat Full Tuition Academic Scholarship (top 15 admitted students); Dean's List (8 semesters); Special Achievement in Biotechnology Award
Activities: Biotechnology Sector Specialist, Investment Club; Molecular Biotechnology Researcher

## LEGAL EXPERIENCE

**Paul, Weiss, Rifkind, Wharton & Garrison LLP**, New York, NY
*Summer Associate, Litigation*, May 2023 – Present
Draft legal memoranda, attend discovery conferences, and participate in strategy meetings for matters.

**Maurice A. Deane School of Law at Hofstra University**, Hempstead, NY
*Research Assistant and Teacher's Assistant*, January 2022 – Present
Research metacognitive learning strategies and regulation pertaining to Civil Procedure and bar passage rates for Professor Jennifer Gundlach. Draft manual to be included in Cases and Materials for Land Use, 8th Edition for Professor Ashira Ostrow. Teach tort law review sessions to first-year students for Professor Greenwood.

**United States District Court for the Eastern District of New York**, Central Islip, NY
*Judicial Intern to the Honorable James Wicks*, September 2022 – December 2022
Drafted summary judgment orders, reports, and recommendations. Wrote bench memoranda for status conferences, preliminary conferences, and oral arguments. Attended various court and trial proceedings.

**United States District Court for the Eastern District of New York**, Central Islip, NY
*Judicial Intern to the Honorable Joanna Seybert*, June 2022 – August 2022
Researched and analyzed claims. Drafted bench memoranda and analysis in preparation for motions. Reviewed briefs and motions. Drafted summary judgment orders.

**Andruzzi Law Esq**, Bethpage, NY
*Paralegal*, June 2021 – September 2021
Drafted discovery requests and responses, motions to compel, summonses, affidavits, and complaints. Conducted legal research, composed legal memoranda, and engaged clients to address concerns and provide case updates.

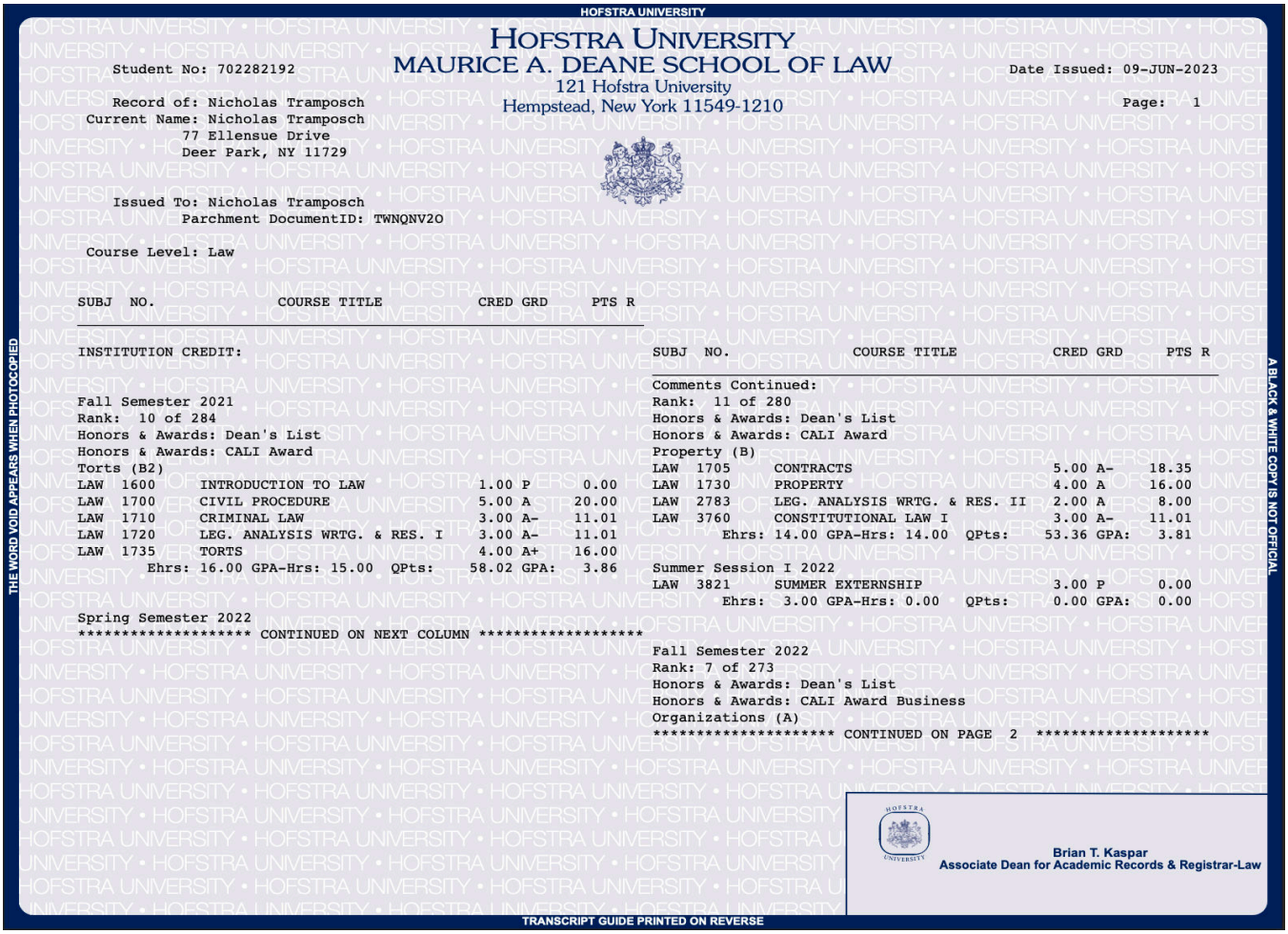
## OTHER EXPERIENCE

**TAMID Consulting at Syracuse University**, Syracuse, NY
*President*, November 2018 – January 2021
Oversaw 12 consulting projects with Tel Aviv-based startups. Created 10 stock pitches on Israeli cloud computing, artificial intelligence, and technology firms for the TAMID national portfolio.

**Neuro-Biomorphic Engineering Lab**, Tel Aviv, Israel
*Business Development Consultant*, May 2020 – August 2020
Conducted due diligence market and patent research for a novel rehabilitative robotic arm.

## INTERESTS

Skiing; volunteering and service; professional wedding photography; classical violin; former Eagle Scout



HOFSTRA UNIVERSITY

# HOFSTRA UNIVERSITY
## MAURICE A. DEANE SCHOOL OF LAW

121 Hofstra University
Hempstead, New York 11549-1210

Student No: 702282192

Date Issued: 09-JUN-2023

Record of: Nicholas Tramposch
Current Name: Nicholas Tramposch
77 Ellensue Drive
Deer Park, NY 11729

Page: 1

Issued To: Nicholas Tramposch
Parchment DocumentID: TWNQNV2O

Course Level: Law

| SUBJ | NO. | COURSE TITLE | CRED GRD | PTS R |
|---|---|---|---|---|
| INSTITUTION CREDIT: | | | | |
| Fall Semester 2021 | | | | |
| Rank: 10 of 284 | | | | |
| Honors & Awards: Dean's List | | | | |
| Honors & Awards: CALI Award | | | | |
| Torts (B2) | | | | |
| LAW | 1600 | INTRODUCTION TO LAW | 1.00 P | 0.00 |
| LAW | 1700 | CIVIL PROCEDURE | 5.00 A | 20.00 |
| LAW | 1710 | CRIMINAL LAW | 3.00 A- | 11.01 |
| LAW | 1720 | LEG. ANALYSIS WRTG. & RES. I | 3.00 A- | 11.01 |
| LAW | 1735 | TORTS | 4.00 A+ | 16.00 |
| Ehrs: 16.00 GPA-Hrs: 15.00 QPts: 58.02 GPA: 3.86 | | | | |
| Spring Semester 2022 | | | | |
| ********** CONTINUED ON NEXT COLUMN ********** | | | | |

| SUBJ | NO. | COURSE TITLE | CRED GRD | PTS R |
|---|---|---|---|---|
| Comments Continued: | | | | |
| Rank: 11 of 280 | | | | |
| Honors & Awards: Dean's List | | | | |
| Honors & Awards: CALI Award | | | | |
| Property (B) | | | | |
| LAW | 1705 | CONTRACTS | 5.00 A- | 18.35 |
| LAW | 1730 | PROPERTY | 4.00 A | 16.00 |
| LAW | 2783 | LEG. ANALYSIS WRTG. & RES. II | 2.00 A | 8.00 |
| LAW | 3760 | CONSTITUTIONAL LAW I | 3.00 A- | 11.01 |
| Ehrs: 14.00 GPA-Hrs: 14.00 QPts: 53.36 GPA: 3.81 | | | | |
| Summer Session I 2022 | | | | |
| LAW | 3821 | SUMMER EXTERNSHIP | 3.00 P | 0.00 |
| Ehrs: 3.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00 | | | | |
| Fall Semester 2022 | | | | |
| Rank: 7 of 273 | | | | |
| Honors & Awards: Dean's List | | | | |
| Honors & Awards: CALI Award Business Organizations (A) | | | | |
| ********** CONTINUED ON PAGE 2 ********** | | | | |

Brian T. Kaspar
Associate Dean for Academic Records & Registrar-Law

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HOFSTRA UNIVERSITY

# HOFSTRA UNIVERSITY
## MAURICE A. DEANE SCHOOL OF LAW

121 Hofstra University
Hempstead, New York 11549-1210

Student No: 702282192 — Date Issued: 09-JUN-2023

Record of: Nicholas Tramposch — Page: 2

| SUBJ NO. | COURSE TITLE | CRED GRD | PTS R |
|---|---|---|---|
| Institution Information continued: | | | |
| LAW 2520 | EXTERNSHIP SEMINAR, JUDICIAL | 1.00 A | 4.00 |
| LAW 2758 | ADVANCED COMPETITION SKILLS | 1.00 P | 0.00 |
| LAW 2861 | HOFSTRA LAW REVIEW | 2.00 P | 0.00 |
| LAW 3200 | FOUNDATIONAL LAWYERING SKILLS | 3.00 A- | 11.01 |
| LAW 3761 | CONSTITUTIONAL LAW II | 3.00 A | 12.00 |
| LAW 3828 | EXTERNSHIP, JUDICIAL | 2.00 P | 0.00 |
| LAW 4701 | BUSINESS ORGANIZATIONS | 4.00 A+ | 16.00 |
| Ehrs: 16.00 GPA-Hrs: 11.00 QPts: | | 43.01 GPA: | 3.91 |
| Spring Semester 2023 | | | |
| Rank: 5 of 281 | | | |
| LAW 2758 | ADVANCED COMPETITION SKILLS | 1.00 P | 0.00 |
| LAW 2861 | HOFSTRA LAW REVIEW | 2.00 P | 0.00 |
| LAW 2921 | PATENT LAW | 2.00 A- | 7.34 |
| LAW 3733 | BIOTECH: LAW, REGLTN & ETHICS | 3.00 A+ | 12.00 |
| LAW 3844 | HEALTH LAW | 3.00 A+ | 12.00 |
| LAW 4761 | EVIDENCE | 4.00 A | 16.00 |
| Ehrs: 15.00 GPA-Hrs: 12.00 QPts: | | 47.34 GPA: | 3.94 |

********** CONTINUED ON NEXT COLUMN **********

| SUBJ NO. | COURSE TITLE | CRED GRD | PTS R |
|---|---|---|---|
| Fall Semester 2023 | | | |
| IN PROGRESS WORK | | | |
| LAW 2741 | LGL SKLLS UNDR REP FED LITIGNT | 2.00 IN PROGRESS | |
| LAW 2742 | PRO SE LGL ASST PRG FLD PLCMNT | 2.00 IN PROGRESS | |
| LAW 3734 | LGL & BIOETH RSP HLTHCRE CHLNG | 3.00 IN PROGRESS | |
| LAW 3794 | BANKRUPTCY | 3.00 IN PROGRESS | |
| LAW 4751 | CRIMINAL PROCEDURE I | 4.00 IN PROGRESS | |
| In Progress Credits 14.00 | | | |

********** TRANSCRIPT TOTALS **********

| | Earned Hrs | GPA Hrs | Points | GPA |
|---|---|---|---|---|
| TOTAL INSTITUTION | 64.00 | 52.00 | 201.73 | 3.87 |
| TOTAL TRANSFER | 0.00 | 0.00 | 0.00 | 0.00 |
| OVERALL | 64.00 | 52.00 | 201.73 | 3.87 |

********** END OF TRANSCRIPT **********

Brian T. Kaspar
Associate Dean for Academic Records & Registrar-Law

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MAURICE A. DEANE SCHOOL OF LAW
HOFSTRA LAW

Daniel J.H. Greenwood
*Professor of Law*

108 Law School
121 Hofstra University
Hempstead, NY 11549

cell: 801-755-7607
Daniel.Greenwood@hofstra.edu

June 6, 2023

Dear Judge:

I write to recommend Nicholas Tramposch for a position as your law clerk.

Mr. Tramposch was a student in my Torts and Business Organizations classes, as well as my teaching assistant in Torts and research assistant. In each of the positions, he excelled.

I teach both Torts and Business Organizations at a high conceptual level – we focus not only on the black letter doctrine and rules, but on the justice, economic, planning and regulatory issues that underlie them, including active controversies and ongoing debates as much as settled law. Successful students come away with an understanding of not only the rules themselves and the policies underlying them but how economic actors can respond to legal rules and how regulators can respond to those responses.

Mr. Tramposch is among the very best students I have had the privilege of teaching at Hofstra.

In Torts, his A+ was earned by the highest score in the class on the exam. Similarly, Mr. Tramposch was highly engaged in class, often bringing his undergraduate training and common sense to add sophistication to his legal analysis and repeatedly pushing the discussion to deeper levels.

As a result of his performance, I invited Mr. Tramposch to be my course assistant the following year. In that role, he took the initiative to organize a series of discussion sessions for students, centered around a close analysis of a multiple-choice question illustrating a particular torts issue. In addition, he produced almost 50 multiple choice questions with accompanying explanations for students to use as practice and to consolidate their understanding of the course. As I edited those questions, I was impressed by the facility with which he identified core doctrinal issues and his pursuit of the relevant issues beyond the surface to examine their broader implications for the law and social regulation of behavior.

Mr. Tramposch's performance in Business Organizations was equally impressive. Again, I found that I could count on him to explain difficult points when his classmates were

MAURICE A. DEANE SCHOOL OF LAW
HOFSTRA LAW

struggling, and again his exam reflected his careful work and deep understanding. I hope that he will assist me again next year in this course as he did last year in torts.

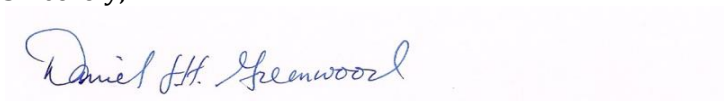
Additionally, Mr. Tramposch suggested working together on an article concerning the Supreme Court's recent changes to religious rights of free exercise and disestablishment. He drafted several sections of this paper and we are currently working together to rewrite and consolidate it.

In each of these contexts, Mr. Tramposch has demonstrated a level of initiative and acumen rarely see; he gets more done on more projects than any student I've worked with for years. Similarly, he has consistently impressed me as well-spoken, organized and prepared. His writing is fundamentally clear, thoughtful and well-organized, if sometimes adjectively overrun. Already quite good, it will rapidly improve with even minimal editing.

Based on my own experience clerking in the SDNY and my opportunities to work with Mr. Tramposch, I expect that the initiative, hard work and ambition he has demonstrated so far will enable him to serve you well as a clerk and then lead him on to a distinguished career as a fine lawyer. I recommend him without qualification for your position.

If I can be of any further help, please call or email.

Sincerely,



Daniel JH Greenwood

Jennifer A. Gundlach
*Emily and Stephen Mendel Distinguished Professor of Law and Clinical Professor of Law*

Room 228, Law School
121 Hofstra University
Hempstead, NY 11549

tel: 516-463-4190
Jennifer.Gundlach@hofstra.edu

May 30, 2023

**RE: Clerkship Application of Nicholas Tramposch**

Dear Judge:

It gives me great pleasure to recommend Mr. Nicholas Tramposch in connection with his application for a post-graduate clerkship with you. I have taught and worked closely with him over the past two years and I can say without a doubt that he stands at the top of my list as one of the most exceptional students I have had in my 23 years of teaching. He is a truly superior candidate who would make an invaluable addition to your chambers.

Nick possesses the ideal blend of strong oral and written analytic skills, with the poise and professionalism required for a law clerk. It was my good fortune to have him as a student in Civil Procedure during his first year at the Maurice A. Deane School of Law at Hofstra University. He exhibited incredible intellectual curiosity and complex analytical thinking every time I cold-called him, as well as when he volunteered during class discussions. It came as no surprise to me when he earned one of the highest A's in my class (of which there are very few), nor that he has since earned top grades in all of his other courses as well.

I was so impressed with Nick's work ethic and the role that he played in helping his peers during my class that I asked him to serve as my Teaching Fellow, as well as my Research Assistant, the following year. In that role, he earned the respect and appreciation of the next year's Civil Procedure students as he led review sessions and created hypothetical fact patterns for students to apply what they were learning. He was also invaluable to me in my empirical research study, spending hours reviewing data and discussing them with me and my colleague. In addition, he worked meticulously to edit an article of mine for publication. That same discipline and attention to detail are what elevated him to Articles Editor of the *Hofstra Law Review* in the coming year, as he continues to adeptly juggle the responsibilities of serving on our Moot Court Board and engaging in interscholastic moot court competitions.

Nick has had remarkable exposure to federal practice during the past two years and has shown great interest in immersing himself in the community of federal practitioners. I was so impressed with him that I recommended him to the senior judge sitting in the Eastern District of New York's Central Islip courthouse, the Honorable Joanna Seybert for a judicial internship during the summer after his first year. I heard from her clerks and Judge Seybert that he was very impressive, and he found the experience so valuable that he then applied for and was accepted

for a second judicial internship with Magistrate Judge James Wicks. And this coming fall, I look forward to having him as a student again, this time in the Hofstra Law Pro Se Legal Assistance program, a hybrid clinic in which I supervise students in providing limited scope legal assistance to self-represented litigants in EDNY civil cases. Through that position, he will have a new opportunity to see federal practice and procedure from the litigant's vantage point. I would also add that Nick regularly attends events hosted by our regional EDNY Chapter of the Federal Bar Association (for which I serve as a faculty advisor) and is always in the audience when there is something to be learned from a visiting judge or distinguished practitioner at the Law School.

Refreshingly, the depth and breadth of Nick's involvement stems from his thirst for learning and immersing himself in different areas of practice. In a sense, he is cultivating his own interdisciplinary legal education by casting a wide network and soaking up all that he can about the legal profession and the practice of law. Nick's superior performance in classes, extracurricular activities, and professional experience during law school are clear evidence of his discipline and deep engagement with the law, qualities that are essential for a trusted law clerk. Just as importantly, Nick is the kind of person who comes along once in a generation of students and who I undoubtedly will remain close to for years to come. He is mature, unassuming, compassionate, funny, and authentic – a true joy to be around. In short, I give him my highest recommendation for a clerkship position.

Warmly,

*Jennifer A. Gundlach*

Jennifer A. Gundlach

HOFSTRA UNIVERSITY
MAURICE A. DEANE SCHOOL OF LAW

LAW FACULTY

121 Hofstra University
Hempstead, NY 11549

law.hofstra.edu

June 2, 2023

Dear Judge:

I write in support of Nicholas Tramposch's application for a clerkship in your chambers. I am a Special Professor of Law at Maurice A. Deane School of Law. I have known Nick since the fall of 2022, when he contacted me about taking my Biotechnology: Law, Regulation and Ethics Seminar. We spoke online and I was immediately impressed with his intelligence and enthusiasm. He was extremely knowledgeable about biotechnology as it relates to law and I could tell that he would add a great deal to our class discussions.

Nick's presence and participation in the seminar were beyond my expectations. He is an extremely considerate person and was outstanding in the quality of his contributions to the class and in his support of his classmates, especially during group assignments. I could always count on him to help out if necessary. He has a great sense of humor and at the same time, a maturity unexpected of students who have not yet embarked on their professional careers. I mention Nick's excellent character because as intelligent as he is, he does not hold himself above others and is humble and empathic.

Although I have only known Nick for one semester, he impressed me as among the top students I have taught during my career. His knowledge of the law is impressive-often in class he would contribute by citing statutes and case law related to the topic of discussion. These contributions were extremely helpful to the class, and I was impressed by his knowledge, detailed retention, and his application of the law. He is as well-versed as any student I have known in many areas of the law. His recall is outstanding but it is anything but rote – he takes legal information and applies it to problems appropriately, inventively, and creatively. I believe that as Nick develops as a scholar and as a professional he will enrich the field of law with his ideas.

Throughout the semester, we had ongoing discussions about his interest in Law and Economics. Much of our class was devoted to the application of bioethics to developments in biotechnology, as well as how the law developed in response to new technology. As the semester went on, we met on several occasions to discuss law and economics and its application to new and developing biotechnology. In our discussions, he evidenced his excellent reasoning ability and combined his theoretical skills to develop a thesis about this application. The result was an exceptionally well-written term paper where he developed his thesis evidencing not only his comprehension of difficult scientific material but his ability to take his thesis and construct viable and interesting legal arguments. I found that our discussions always brought up new and interesting questions. While always respectful, Nick often challenged assertions, arguing various ways of approaching legal issues.

Nick is extremely hardworking, energetic, generous, and creative. He enjoys being challenged intellectually and looks for opportunities to add to his knowledge of the law. I expect that he will excel in his career, and I look forward to watching him flourish. Because of all of his personal qualities, his

intelligence, and his enthusiasm, I believe he would be an excellent clerk and offer outstanding research and writing support to your chambers. As a result of his abilities, character, and promise, I unequivocally support his application.

Please let me know if you need any additional information.

Sincerely,

Tracy Dunbrook
Special Professor of Law
Maurice A. Deane School of Law
Hofstra University
tracy.a.dunbrook@hofstra.edu
917-865-1212

**Nicholas E. Tramposch**
77 Ellensue Drive, Deer Park, NY 11729 | ntramposch1@pride.hofstra.edu | (631) 681-0959

The enclosed writing sample is an appellate brief concerning the First Amendment rights and academic freedom of a public university professor, which I prepared in anticipation of the American Bar Association's National Appellate Advocacy Competition, Brooklyn Regional. At the competition, our team argued on behalf of both sides throughout five rounds of competition. Although our team competed together, I was responsible for briefing and arguing our second issue: this writing sample is entirely my own work product. I have omitted the table of contents, the table of authorities, the jurisdictional statement, and portions of the other sections for brevity. I would be happy to provide the full brief upon request.

No. 01–463

# In the Supreme Court of the United States

JONAH SMITH,

*Petitioner*,

*v.*

ALBERT HALL, SHELIA BARRETT, AND WESTLAND COMMUNITY COLLEGE.

*Respondents.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT**

**BRIEF FOR THE PETITIONER JONAH SMITH**

NICHOLAS TRAMPOSCH
77 Ellensue Drive
Deer Park, NY 11729

Counsel for the Petitioner

## ISSUE PRESENTED

Whether the First Amendment's prohibition against compelled speech limits a public college's power to require an experienced professor to endorse a viewpoint that conflicts with the instructor's academic views.

## STATEMENT OF THE CASE

This Court has long recognized that the First Amendment prohibits the government from compelling its citizens to speak—or remain silent. *E.g.*, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 629 (1943). College classrooms are unique in offering a forum for the marketplace of ideas to flourish. At a time when education plays an increasing role in employment opportunities, "academic freedom is a special concern of the First Amendment, which does not tolerate laws that case a pall of orthodoxy over the classroom." *Keyishian v. Board of Regents*, 385 U.S. 589, 608 (1967).

This case concerns such a pall of orthodoxy arising from the disciplined attempt of a floundering public community college to conscript its faculty into making written and verbal oaths during classroom instruction. In the spring of 2019, Petitioner Jonah Smith faced a choice: he could either parrot his public employer's institutional ideals, suppressing his personal academic beliefs, or risk losing his job and his opportunity for tenure. (Record ("R."), at 10–11.)

In 2019, to address the school's ongoing student recruitment and retention issues, the Westland Community College ("WCC") administration began to develop the "New Student Experience" ("NSE"). (R., at 8–9.) The administration's goal in promulgating the NSE curriculum was twofold: first, it sought "to expose new students to WCC campus resources, culture, and values"; second, it aimed "to increase student engagement and increase retention, particularly among traditionally underserved student populations." (R., at 8.)

The NSE pilot program required faculty members to dictate certain statements and viewpoint, offering them neither the ability to dissent nor distance themselves from the

institution's message. (R., at 8–9.) Jonah Smith, an experienced professor with tenure ambitions, expressed his concerns to administration over this material and his unwillingness to surrender his protected speech. (R., at 10.) In response, Albert Hall ("Hall"), Academic Dean of WCC, and Shelia Barrett ("Barrett"), Chair of the Philosophy Department, rescinded Smith's return offer. (R., at 10.)

Hall, Barrett, and WCC (together "Respondents") now seek refuge from Smith's compelled speech claim under the protection of the government speech doctrine, which strips away the First Amendment's requirement of government neutrality when the government, itself, speaks. *See, e.g.*, *Shurtleff v. City of Bos., Massachusetts*, 142 S. Ct. 1583, 1589 (2022). Against the great weight of this Court's precedents supporting a professor's unabated First Amendment rights in the classroom, the Thirteenth Circuit held that Jonah Smith's speech fell within the purview of the government speech doctrine, thereby barring it from the First Amendment's protections. (R., at 11.) This Court should reverse the decision of the Thirteenth Circuit and reaffirm the role of the First Amendment and academic freedom in public colleges.

## STATEMENT OF FACTS

### Smith's Employment History at Westland Community College

In 2009, Jonah Smith, a PhD in philosophy, started working in the WCC Philosophy Department as an untenured professor. (R., at 4.) For a decade, Smith taught two introductory philosophy of law courses and two specialized philosophy courses. (R., at 4.) During his time at WCC, students lauded Smith's ability to create an engaging learning environment that spurred critical thinking and rigorous discourse. (R., at 4–5.) Although not required to publish scholarly papers, Smith regularly engaged in research and scholarship during his time at WCC in the hopes that he could earn a tenured position. (R., at 5.)

**February 2019 Classroom Discussion in Smith's Philosophy of Law Course**

In February 2019, Smith facilitated an active class discussion in his Philosophy of Law course for his Section A students. (R., at 5.) Smith introduced a new topic: ethical legal representation, using as an example, local attorney and WCC faculty member Sally Sanders. (R., at 5.) Smith defended Sanders, who had publicly represented "disgraced businessman," Martin Michelson in a recent lawsuit (R., at 5.) In the months prior, students had coordinated protests to prevent Sanders from teaching at WCC, and many reported being victimized by Michelson. (R., at 5.) To stimulate critical thinking, Smith presented the argument that Sanders was acting ethically in representing Michelson. (R., at 5.) Smith called upon one student to participate in the debate, but the student declined to engage. After class, some students approached Barrett to express their discontent with Smith's efforts. (R., at 6.)

In their discussion with Barrett, the students claimed to feel personally attacked by Smith's statements and generally discomforted with the discussion of Sanders, Michelson, and cancel culture. (R., at 6.) They furthered expressed their belief that Smith's classroom was no longer a safe learning environment. (R., at 6.) Some of these students subsequently posted about Smith's in-class comments on WCC's social media page. (R., at 6.) Notably, no students attributed Smith's speech to the university itself in either the meeting or the social media posts. (R., at 6.)

**Respondents' Reaction to the Students' Classroom Feedback**

Barrett and Hall held a meeting with Smith to discuss the social media posts. (R., at 6.) Smith explained that his teaching approach was designed to help students navigate controversial issues, a crucial part of the curriculum. (R., at 6.) Barrett and Hall informed Smith that they would investigate further and asked him to refrain from discussing "cancel

culture" in the classroom. (R., at 6.) Smith expressed his disagreement with their position and the meeting concluded. (R., at 6.)

The next day, students in Smith's Section B Philosophy of Law class interrupted the lesson when Smith discussed the same content from the previous day. (R., at 7.) Several students walked out of the class in protest as Smith continued to teach, and those students went to the WCC social media page to call for Smith's termination. (R., at 7.) Thereafter, WCC removed Smith from teaching the Philosophy of Law course for the remainder of the semester but allowed him to continue teaching his two introductory Formal Logic courses. (R., at 7.)

**The NSE Curriculum and WCC's Conditions for Rehiring Smith**

By the spring of 2019, the NSE program was ready, and Hall approached Smith with a formal employment offer. (R., at 7.) Under the new contract, Smith's teaching load would include four courses: two Formal Logic courses and two Introductory Survey courses. (R., at 7.) Additionally, the program required Smith and other NSE professors to attend an NSE orientation session run by Hall. Following the session, professors would be required to adhere to the curriculum and guidelines adopted by the NSE committee and the WCC administration. (R., at 7–8.)

These guidelines introduced several procedural and substantive changes to teaching at WCC. For example, teachers at WCC had traditionally designed their own syllabus; but the NSE program mandated that instructors include certain provisions. (R., at 8.) First, WCC's policies as they pertained to diversity, accessibility, and civility policies, as well as WCC resources and campus information. (R., at 8.) Second, WCC's Land Use Acknowledgment clause, which included oaths of affirmation in opposition to Lockean property theory, Smith's primary research interest.[1] (R., at 8.)

[1] As the Record reflects, Respondents concede on appeal that Smith's views are genuine and contravened by the Land Use Acknowledgement Clause. (R., at 8.) Therefore, if this Court were to

The NSE curriculum also included new classroom teaching requirements. (R., at 8.) Once a week, 20 minutes of class time would be devoted to promoting WCC community values. (R., at 8.) In this time, professors would discuss weekly NSE readings, as designated by the administration, and read aloud bullet points. (R., at 9.) After class, students were to submit written reflection papers to be read aloud by Smith to the students. (R., at 9.) The language Smith would be forced to use included, "*our* campus values …" and "at WCC *we* value…." (R., at 9) (emphasis added.) According to Barrett, the purpose of the new curriculum was to build shared values, increase student engagement and retention, and help students of diverse backgrounds feel more comfortable in class. (R., at 9.) Barrett notified Smith that NSE administrators would be monitoring the NSE classes in order to assess the effectiveness of the new program. (R., at 9.)

Following the orientation, Smith arranged a meeting with Barrett and Hall to express his two main concerns with the NSE program. (R., at 9.) First, Smith was concerned that students may assume he believed in the Land Use Acknowledgement clause, and expressed a view of property directly opposed to his own. (R., at 9.) Hall informed Smith that the clause would be mandatory for all NSE courses. (R., at 9.) Smith suggested adding a disclaimer to the syllabus stating the clause did not align with his personal view, or alternatively, placing a link to the WCC website for students to access rather than the entire full clause. (R., at 9.) Hall rejected both of Smith's solutions. (R., at 9.)

Second, although Smith had no objections to including NSE subject matter and assigning the extra readings for the course, he was concerned with the required bullet points in the NSE lesson plans. (R., at 9–10.) Smith raised a conscientious objection to teaching those bullet points in a manner that implied his personal adoption or endorsement of those views. (R., at 10.) Barrett and Hall dismissed Smith's concerns. (R., at 10.) Still, Smith

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find that the government speech doctrine does not apply to the instant case, any balancing inquiry or test would be analyzed by the district court on remand.

proposed a compromise: after incorporating the viewpoints of WCC into the curriculum, he asked for the ability to present his own position and "engage the class in discussion recognizing multiple viewpoints[.]" (R., at 10.) Barrett and Hall rejected the suggestion and cautioned Smith that his NSE course would be monitored by WCC administrators. (R., at 10.) Smith was willing to look for a workable alternative approach but was reluctant to include the Land Acknowledgement clause into the syllabus or convey the bullet points as written due to the conflict they created with his academic views. (R., at 10.)

Shortly thereafter, Hall informed Smith that WCC has rescinded his contract offer for the fall 2019 semester. (R., at 10.) According to Hall, because Smith was unwilling to fulfill the curricular requirements, WCC would instead hire someone who would. (R., at 11.) Smith asked if he could continue to teach his Formal Logic courses or other courses that did not include the NSE curriculum. (R., at 11.) Hall declined his counteroffer. (R., at 11.) Smith subsequently filed a lawsuit against Hall, Barrett, and WCC. (R., at 11.)

## SUMMARY OF ARGUMENT

The Thirteenth Circuit Court of Appeals erred in affirming the district court's denial dismissal of Smith's First Amendment compelled speech claim. The courts below improvidently relied on the government speech doctrine outlined in *Garcetti v. Ceballos*, requiring Smith to adopt the government's viewpoint.

Smith's compelled speech claim must prevail for two reasons. First, the Respondents incorrectly attempt to define the speech in the instant case as government speech. Under *Shurtleff v. City of Bos., Massachusetts*, the Respondents fail to satisfy the requisite factors of the speaker analysis: the history of the expression, the public's perception of the speaker, and the extent of the government's control over the expression. Respondents fail to show that the reasonable member of the audience, a student in Smith's classroom, would perceive his classroom instruction as speaking on behalf of WCC. Moreover, Respondents have not

shown a longstanding history of curricula like the NSE, which counsels against a holding of government speech.

Second, the Thirteenth Circuit failed to acknowledge this Court's precedent, which disallows the government from trying to force a public employee to adopt the viewpoint of the government as their own. As recognized in *Janus v. AFSCME*, members of the founding generation condemned laws similar in effect to the NSE curriculum. Accordingly, the lower court's decision as it pertains to the 12(b)(6) motion to dismiss Smith's 35 U.S.C. § 1983 claim must be reversed, and this case remanded back to the lower courts to apply an analysis consistent with this brief.

## ARGUMENT

**Respondents' Efforts to Compel Smith's Speech Against His Profoundly Held Academic Beliefs Violate His Fundamental First Amendment Rights and Do Not Adhere to the Government Speech Doctrine.**

The freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018) (citing *Wooley v. Maynard,* 430 U.S. 705, 714 (1977)); *see Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) ("Since *all* speech inherently involves choices of what to say and what to leave unsaid … one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say[.]") (citing *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.,* 475 U.S. 1, 11 (1986) (internal quotations omitted)).

This powerful statement presupposes an even greater admonition—the government may not coerce citizens to adopt or convey a message. *Barnette*, 319 U.S. at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

### *A. Freedom From Compelled Government Speech is a Fundamental First Amendment Protection Extending to Verbal Speech and Nonverbal Assertions*

In *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), this Court held that the First Amendment prohibited West Virginia from compelling public school children to recite the Pledge of Allegiance and salute the flag. *Id.* at 642. Observing that such a mandate invaded the "individual freedom of mind," this Court recognized that such conformity is repugnant to the First Amendment. *Id.* Under *Barnette*, no law can compel an individual to deviate from this "fixed star." *Id.* ("If there are any circumstances which permit an exception, they do not now occur to us.").

Three decades later, in *Wooley v. Maynard,* 430 U.S. 705 (1977), this Court extended *Barnette* to compelled speech which *indirectly* affirms a message, striking down a New Hampshire law imposing criminal sanctions upon Jehovah's Witnesses who refused to display the state's motto, 'Live Free or Die,' on their license plate. *Id.* at 707. In *Wooley*, this Court recognized that a flag salute involved a more severe infringement, as the display of a license plate less directly compels an individual to affirm a viewpoint. *Id.* at 715. However, it explicitly noted that this difference was one "essentially of degree." *Id.* Insomuch as the New Hampshire law required an individual to adopt a morally objectionable message, this Court required the showing of a sufficiently compelling state interest and no less drastic means for achieving the same basic purpose. *Id.* at 716–7.

These cases demonstrate two important principles: (1) states may not compel individuals to support a curricular message of orthodoxy directly, *Barnette*, 319 U.S. at 642; (2) nor can states compel individuals to engage in conduct which a third party would understand to be support of a message, *Wooley*, 430 U.S. at 707.[2] In any of these

[2] Similarly, it cannot force businesses or individuals to pay money to support a program they would not otherwise support. *See United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) (holding that these protections apply to businesses compelled to pay monetary subsidies); *see also Janus*, 138 S. Ct.

circumstances, strict scrutiny applies. *Id.* at 716; s*ee* Clay Calvert, *Selecting Scrutiny in Compelled-Speech Cases Involving Non-Commercial Expression: The Formulaic Landscape of A Strict Scrutiny World After Becerra and Janus, and A First Amendment Interests-and-Values Alternative*, 31 Fordham Intell. Prop. Media & Ent. L.J. 1, 85 (2020) (discussing the importance of strict scrutiny in claims regarding compelled speech of opinions rather than compelled speech of facts).

If this Court were to—as the Respondents have argued it should—adopt a lower level of scrutiny for compelled speech claims in schools, then it would erode a fixed star of constitutional jurisprudence. *See* Joseph J. Martins, *The One Fixed Star in Higher Education: What Standard of Judicial Scrutiny Should Courts Apply to Compelled Curricular Speech in the Public University Classroom?*, 20 U. Pa. J. Const. L. 85, 135 (2017). Accordingly, this Court should reverse this case and remand it to the district court for application of strict scrutiny.

### *B. The Speech Implicated In the Instant Case Does Not Fall Within Purview of the Government Speech Doctrine*

Government speech is not barred by the First Amendment. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015). When the government is the speaker, the democratic electoral process serves as a check on that speech. *Id.* In line with this exception, the government may discriminate "on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals." *Id.* (citing *Rust v. Sullivan,* 500 U.S. 173, 194 (1991)).

Opposite to government speech lies the compelled speech doctrine. The government may not "compel private persons to convey the government's speech." *Walker*, 576 U.S. at

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at 2463 (applying similar analysis to compelled subsidization of union dues). This line of cases and their modified scrutiny analysis set them apart from *Barnette* and *Wooley*. *See Janus*, 138 S. Ct. at 2463.

208. This Court has recognized that even government speech can raise free speech concerns. *Id.* at 219 ("Our determination that Texas's specialty license plate designs are government speech does not mean that the designs do not also implicate the free speech rights of private persons."); *see Wooley*, 430 U.S. at 717, n.15 (observing that a vehicle "is readily associated with its operator" and that drivers displaying license plates "use their private property as a 'mobile billboard' for the State's ideological message").

In *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015), this Court considered the following factors to determine whether the state of Texas spoke for itself: whether the forum in which the speech occurred had historically been used for government speech, whether the public would interpret the speech as being conveyed by the government, and whether the government had maintained control over the speech. *Id.* at 209 (finding that the state board had engaged in government speech because the license plates in question historically conveyed governmental ideologies, the public was likely to believe that messages on license plates were on the government's behalf, and the state had "maintain[ed] direct control" over proposals and "actively" reviewed them).

In *Shurtleff v. City of Bos., Massachusetts*, this Court reaffirmed that these interpretations are evaluated via a holistic application of factors. 142 S. Ct. at 1589. They are guided by the history of the expression, the public's perception as to who—the government or a private person—is speaking, and the extent of the government's control over that expression. *Id.* (finding that the City of Boston's flag approval process, which historically conveyed the government's messages, was not governmental speech because observers could view the message as private, and the city had no meaningful involvement in the selection of flags).

As applied to university professors, circuit courts have looked to the nature of the professor's speech. For example, the Sixth Circuit has held that a university requires a professor to provide "detailed advice to students about the administrative aspects of a

course." *See Johnson-Kurek v. Abu-Absi*, 423 F.3d 590, 591 (6th Cir. 2005). However, that professor could not be constitutionally compelled to "communicate the ideas or evaluations of others as if they were her own." *Id.* at 595.

Under the great weight of circuit precedent, professors have no First Amendment interest in the formalities of teaching: grading, administrative duties, and ministerial conduct. *See, e.g.*, *Brown v. Armenti*, 247 F.3d 69, 75 (3d Cir. 2001) ("Because grading is pedagogic, the assignment of the grade is subsumed under the university's freedom to determine how a course is to be taught.").

However, in *Garcetti*, this Court noted the complex nature of claims involving classroom speech dedicated to the curricular subject matter and the need to protect the academic speech and viewpoint of college professors. *See Garcetti,* 547 U.S. at 425. And the majority of circuits have walked through this door. *See Meriwether*, 992 F.3d at 507 (collecting cases). But the Thirteenth Circuit, contrary to this Court's strong consideration, altogether ignored this dictum. (*See* R., at 21.)

In the instant case, the Thirteenth Circuit held that Smith's allegations were insufficient to state a claim, finding that the Respondents never required Smith to adopt their viewpoint as it pertains to the NSE curriculum. (R., at 21.) It reasoned that being required to speak "*our* values as WCC" and "WCC's values as a community" fall short of constituting a First Amendment compelled speech claim. (R., at 21.) Further, it held that "being required to describe and convey the position of the government … is *not* equivalent to requiring the employee to *personally* endorse the ideas." (R., at 21.) Thus, the Thirteenth Circuit appears to have held—without analyzing—that Smith's speech would be attributable to him as an officiant of the government, rather than as a private citizen.

The speech in question cannot fall under the government-speech doctrine as the Thirteenth Circuit contends. (R., at 18.) Further, the government cannot compel conformity

nor require a college professor to adopt a specific viewpoint on a matter of public concern. *See, e.g.*, *Meriwether v. Hartop,* 992 F.3d 492, 510 (6th Cir. 2021).

*1. Smith Is Entitled in First Amendment Protections Because His Speech Does Not Meet the Shurtleff Government Speech Test*

In *Shurtleff v. City of Bos., Massachusetts*, 142 S. Ct. 1583 (2022), this Court underscored that government speech is a holistic inquiry subject to no formulaic test. *Id.* at 1589. Under *Shurtleff*, courts examine the history of the expression, the public's perception as to who is speaking, and the extent of the government's control over the expression. *Id.*

Concerning the government's control, it is clear that WCC exercised little control over Smith's expressions made pursuant to curricular speech. Indeed, WCC continued to rehire Smith each year, fully aware of his distinctive and enigmatic teaching style. By contrast, the state board in *Walker* had "maintain[ed] direct control" over license plate designs by "actively" reviewing every proposal and rejecting at least a dozen. *See Walker*, 576 U.S. at 213; *see Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 472–473 (2009) (finding that Pleasant Grove City spoke for itself by erecting a monument because the City had "almost always" chosen the subject matter of monuments). Here, akin to *Shurtleff*, there is no "comparable record" of public colleges exercising control over faculty. *See Shurtleff*, 142 S. Ct. at 1589. University professors unquestionably occupy a public position beyond the "direct control" of the state. *Walker*, 576 U.S. at 213; *see Meriwether*, 992 F.3d at 507. Any speech by Smith is inherently his own—not WCC's.

As to the reasonable observer prong, Justice Breyer's analysis in *Shurtleff* focused on the fact that the City of Boston could have done more to clarify that it was speaking for itself. 142 S. Ct. at 1593 ("Boston could easily have done more to make clear it wished to speak for itself by raising flags."). Justice Breyer pointed out that other cities provided text expressly declaring the intent to express their views. *See id.* ("The City of San Jose, California, for example, provides in writing that its 'flagpoles are not intended to serve as a

forum for free expression by the public,' and lists approved flags that may be flown 'as an expression of the City's official sentiments.'") (further citation omitted). Like the City of Boston, WCC seeks to have its cake and eat it too. Neither the inclusions in the syllabus nor the classroom discourse clearly demonstrate that the *institution* is speaking, highlighting WCC's lack of control. *Id.* If the syllabus had a carve-out similar to the one suggested by Justice Breyer, there would be no dispute that the speech was of government character.

Further, the record suggests that a reasonable student would perceive Smith's speech to be his own, rather than WCC's. For example, students generally attributed Smith's speech to Smith himself. The record indisputably shows that students approached Barrett "to complain about *Smith's* statements in class" because they felt "personally attacked by *his* criticisms." (R., at 6) (emphasis added.) They felt "uncomfortable with *Smith's* commentary." (R., at 6.) (emphasis added.) This indicates that students deem Smith's speech as attributable to him. Additionally, the record further shows that Smith is the sole lecturer in his classes, selects the majority of the curriculum, and facilitates class discussions. (R., at 4–5.) Reasonable observers would—and clearly did—believe that this was Smith's personal speech. For this reason, they are likely to attribute future speech to him as well.

It is worth noting that while the government may have some interest in a public employee aligning their personal message with that of the public employer, the attributes of a college professor in a public school are afforded exceptions. B. Jessie Hill, *Compelled Speech: The Cutting Edge of First Amendment Jurisprudence: Look Who's Talking: Conscience, Complicity, and Compelled Speech*, 97 Ind. L.J. 913, 917 (discussing the limits on government's ability to compel the speech of a professor, especially when the government message is ideological in nature). The academic freedom exception maintains that a college or university professor has a stronger interest in preserving their academic viewpoint even when conveying a message on behalf of a public institution. *See Meriwether*, 992 F.3d at 506 (noting that the government cannot silence the viewpoint of a professor, especially viewpoints

that can spark insightful classroom discussion). Here, Smith's interest in his students being aware of his position as it pertains to the NSE message is supported by the academic freedom doctrine. *Id.* at 507 ("[A] professor's in-class speech to his students is anything but speech by an ordinary government employee.").

Finally, the historical inquiry counsels in favor of Smith. In the government speech context, the historical background factor looks not to "general history." *Shurtleff*, 142 S. Ct. at 1591. Rather, it looks at how the government tends to express its view via a certain medium of expression. This factor cuts both ways. Undoubtedly, there is a "general history" of the government expressing its views in grammar schools across America. But there is no such tradition amongst institutions of higher education, which have been, at times, the seat of government protests.

*2. The Government Can Neither Compel Conformity of Public University Professors Nor Require Them to Adopt the Government's Viewpoint as Their Own*

The foundation of compelled speech draws from the "general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley*, 515 U.S. at 573. Under the thrust of the First Amendment, "members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed." *Janus*, 138 S. Ct. at 2471. Free speech rights may be implicated, like here, where the government compels individuals to speak, even if the government is engaged in speech. *See Wooley*, 430 U.S. at 714. Even when it acts as speaker, the government cannot compel public officials to affirm nor adopt a viewpoint; it can only require them to state the government's position. *See Janus*, 138 S. Ct. at 2470.

The WCC Land Use Acknowledgement Clause, which Smith must include in his syllabus, plainly requires a value judgment presupposed by the *Hurley* court. *See Hurley*, 515 U.S. at 573. Similarly, the NSE program requires Smith to read out loud a document

saying, "*our* campus values include" and "at WCC, *we* value…." These statements force faculty members to *personally* endorse the values of WCC, thus triggering the First Amendment. *See Hurley,* 515 U.S. at 573. Thus, these policies involve directly compelling speech, *Barnette*, 319 U.S. at 642, or at least acting indirectly such that a reasonable observer could attribute the ideas to the speaker. *See Wooley*, 430 U.S. at 707.

Here, the Respondents attempt to force Smith not only to state WCC's position, but to also adopt it as his own. This runs afoul of the spirit of the First Amendment: colleges may assign curriculums but cannot force their teachers to adopt the viewpoints of the government. *See, e.g.*, *Kennedy v. Bremerton School District*, 597 U.S. ___ (2022) ("[T]he First Amendment's protections extend to 'teachers and students' neither of whom 'shed their constitutional rights to freedom of speech or expression at the schoolhouse.'") (citing *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969)). For example, a teacher may be required to teach their students the history of an American flag within a history class; however, that same teacher cannot be forced to pledge their allegiance to that flag or state that they believe in its values. *See Barnette*, 319 U.S. at 624. By not allowing Smith to clarify his personal position as to the NSE curriculum, the Respondents trampled on an essential constitutional right.

## CONCLUSION

Because the First Amendment limits a public college or university from compelling a professor's speech when it conflicts with their deeply held academic beliefs, this Court should REVERSE the judgment of the United States Court of Appeals for the Thirteenth Circuit and remand this case for further proceedings.

Respectfully submitted,
Attorney for the Petitioner

## Applicant Details

| | |
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| | |
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| Date of JD/LLB | **May 19, 2024** |
| Class Rank | **25%** |
| Law Review/Journal | **Yes** |
| Journal(s) | **The George Washington University Law Review** |
| Moot Court Experience | **No** |

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| | |
|---|---|
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**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

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June 12, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, Virginia 23510

Dear Judge Walker,

I am a law student at The George Washington University Law School and will graduate in May 2024. I write to apply for a judicial clerkship for the 2024 Term.

Enclosed, please find a resume, a transcript, and a writing sample. In reviewing my transcript, please note that my grade for Criminal Law is "Credit" instead of a letter grade because I took a make-up exam due to an illness during the exam period, per GW Law's grading policies. Also included are letters of recommendation from Professor Kathryne Young, Professor Erika Pont, and Mr. Colin Ross.

If you have any questions, please feel free to contact me at the above address and phone number. Thank you for your consideration.

Respectfully,

Caroline Uehling

# Caroline Uehling

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## EDUCATION

**The George Washington University Law School** — Washington, DC
J.D. expected — May 2024
GPA: 3.64 (Thurgood Marshall Scholar - Top 16-35% of class as of Spring 2023)
Activities: *The George Washington Law Review*, Articles Editor; Writing Fellow; Research Assistant to Professor Miriam Galston; International Refugee Assistance Project, Communications Director; Civil Procedure Tutor

**The George Washington University** — Washington, DC
B.A., *summa cum laude*, Political Science and History — May 2021
Activities: No Lost Generation, Symphonic Band, President of Democracy Matters

## WORK EXPERIENCE

**Military Commissions Defense Organization** — Arlington, VA
*Legal Intern* — May 2023 – Present

- Assists legal defense team through discovery review, legal research, drafting motions and memoranda, and preparing for hearings.

**Pro Se Staff Attorney's Office, United States District Court for the District of Maryland** — Baltimore, MD
*Legal Intern* — June – July 2022

- Reviewed prisoner civil rights cases; drafted orders and memoranda opinions.

**Gilbert Employment Law** — Silver Spring, MD
*Legal Assistant* — July – August 2021

- Conducted intake interviews with prospective clients and took notes during initial consultations.

*Legal Intern* — June – July 2018; June – August, September – December 2019

- Took notes during initial consultations, meetings with clients, and depositions.
- Drafted litigation plans and deposition digests.
- Organized client documents, prepared binders with exhibits for trial, prepared documents for service.

**National Democratic Redistricting Committee** — Washington, DC
*Branding, Creative, and Social Media Intern* — September – December 2020

- Researched election information for state-by-state infographics, created graphics for endorsed candidates.
- Edited websites for optimal functionality and aesthetics through Squarespace and WordPress.
- Responded to and organized emails to the official account from potential donors and collaborators.

**The Office of Congresswoman Madeleine Dean** — Washington, DC
*Intern* — September – December 2019

- Wrote policy memoranda regarding topics such as per- and polyfluoroalkyl substances (PFAS) contamination and the Endangered Species Act, attended legislative briefings, prepared for hearings.
- Listened to and orally addressed constituents' concerns and complaints; organized written constituent communications and drafted responses; drafted social media posts.

## INTERESTS

Volunteer researcher with the Florida Rights Restoration Coalition. Dog walker through Rover.com.
Enjoys Phillies baseball, GW Law Softball, playing trombone, hiking, baking, and gardening.

# THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

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Page: 1

Student Level: Law
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GEORGE WASHINGTON UNIVERSITY CREDIT:

| SUBJ NO | COURSE TITLE | CRDT | GRD PTS |
|---|---|---|---|
| **Fall 2021** | | | |
| Law School | | | |
| Law | | | |
| LAW 6202 | Contracts<br>Chatman | 4.00 | B+ |
| LAW 6206 | Torts<br>Schoenbaum | 4.00 | B+ |
| LAW 6212 | Civil Procedure<br>Smith | 4.00 | A |
| LAW 6216 | Fundamentals Of Lawyering I<br>Pont | 3.00 | A- |
| Ehrs 15.00 GPA-Hrs 15.00 GPA 3.578 | | | |
| CUM 15.00 GPA-Hrs 15.00 GPA 3.578 | | | |
| THURGOOD MARSHALL SCHOLAR | | | |
| TOP 16% - 35% OF THE CLASS TO DATE | | | |
| **Spring 2022** | | | |
| Law School | | | |
| Law | | | |
| LAW 6208 | Property<br>Nunziato | 4.00 | A- |
| LAW 6209 | Legislation And Regulation<br>Schaffner | 3.00 | A |
| LAW 6210 | Criminal Law | 3.00 | CR |
| LAW 6214 | Constitutional Law I<br>Morrison | 3.00 | A- |
| LAW 6217 | Fundamentals Of Lawyering II<br>Pont | 3.00 | B+ |
| Ehrs 16.00 GPA-Hrs 13.00 GPA 3.667 | | | |
| CUM 31.00 GPA-Hrs 28.00 GPA 3.619 | | | |
| Good Standing | | | |
| THURGOOD MARSHALL SCHOLAR | | | |
| TOP 16% - 35% OF THE CLASS TO DATE | | | |

********** CONTINUED ON NEXT COLUMN **********

| SUBJ NO | COURSE TITLE | CRDT | GRD PTS |
|---|---|---|---|
| **Fall 2022** | | | |
| Law School | | | |
| Law | | | |
| LAW 6230 | Evidence<br>Young | 3.00 | A- |
| LAW 6400 | Administrative Law<br>Glicksman | 3.00 | B+ |
| LAW 6520 | International Law<br>Coffee | 3.00 | A |
| LAW 6666 | Research And Writing<br>Fellow<br>Blinkova | 2.00 | CR |
| LAW 6886 | Domestic Terrorism<br>Brzozowski | 2.00 | A- |
| Ehrs 13.00 GPA-Hrs 11.00 GPA 3.667 | | | |
| CUM 44.00 GPA-Hrs 39.00 GPA 3.632 | | | |
| Good Standing | | | |
| THURGOOD MARSHALL SCHOLAR | | | |
| TOP 16% - 35% OF THE CLASS TO DATE | | | |
| **Spring 2023** | | | |
| LAW 6218 | Professional Responslbty/Ethic | 2.00 | A+ |
| LAW 6360 | Criminal Procedure | 4.00 | B+ |
| LAW 6546 | International Law-Human Rights | 3.00 | A- |
| LAW 6552 | Law Of War | 2.00 | A- |
| LAW 6666 | Research And Writing<br>Fellow | 2.00 | CR |
| Ehrs 13.00 GPA-Hrs 11.00 GPA 3.667 | | | |
| CUM 57.00 GPA-Hrs 50.00 GPA 3.640 | | | |
| Good Standing | | | |
| THURGOOD MARSHALL SCHOLAR | | | |
| TOP 16% - 35% OF THE CLASS TO DATE | | | |
| **Fall 2022** | | | |
| Law School | | | |
| Law | | | |
| LAW 6657 | Law Review Note<br>Credits In Progress: | 1.00<br>1.00 | ---------- |
| **Spring 2023** | | | |
| LAW 6657 | Law Review Note<br>Credits In Progress: | 1.00<br>1.00 | ---------- |

********** CONTINUED ON PAGE 2 **********

Katie Cloud
Interim University Registrar

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# THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

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GWid : G40155276
Date of Birth: 21-NOV

Date Issued: 05-JUN-2023

Record of: Caroline Uehling

Page: 2

| SUBJ NO | COURSE TITLE | CRDT | GRD PTS |
|---|---|---|---|
| Fall 2023 | | | |
| LAW 6538 | Immigration Law | 3.00 | ---------- |
| LAW 6633 | Civil And Human Rights Clinic | 6.00 | ---------- |
| LAW 6658 | Law Review | 1.00 | ---------- |
| LAW 6683 | College Of Trial Advocacy | 3.00 | ---------- |
| | Credits In Progress: | 13.00 | |

********** TRANSCRIPT TOTALS **********

| | Earned Hrs | GPA Hrs | Points | GPA |
|---|---|---|---|---|
| TOTAL INSTITUTION | 57.00 | 50.00 | 182.00 | 3.640 |
| OVERALL | 57.00 | 50.00 | 182.00 | 3.640 |

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**EXPLANATION OF COURSE NUMBERING SYSTEM**

**All colleges and schools beginning Fall 2010 semester:**

| | |
|---|---|
| 1000 to 1999 | Primarily introductory undergraduate courses. |
| 2000 to 4999 | Advanced undergraduate courses that can also be taken for graduate credit with permission and additional work. |
| 5000 to 5999 | Special courses or part of special programs available to all students as part of ongoing curriculum innovation. |
| 6000 to 6999 | For master's, doctoral, and professional-level students; open to advanced undergraduate students with approval of the instructors and the dean or advising office. |
| 8000 to 8999 | For master's, doctoral, and professional-level students. |

**All colleges and schools except the Law School, the School of Medicine and Health Sciences, and the School of Public Health and Health Services before Fall 2010 semester:**

| | |
|---|---|
| 001 to 100 | Designed for freshman and sophomore students. Open to juniors and seniors with approval. Used by graduate students to make up undergraduate prerequisites. Not for graduate credit. |
| 101 to 200 | Designed for junior and senior students. With appropriate approval, specified courses may be taken for graduate credit by completing additional work. |
| 201 to 300 | Primarily for graduate students. Open to qualified seniors with approval of instructor and department chair. In School of Business, open only to seniors with a GPA of 3.00 or better as well as approval of department chair and dean. |
| 301 to 400 | Graduate School of Education and Human Development, School of Engineering and Applied Science, and Elliott School of International Affairs – Designed primarily for graduate students.<br>Columbian College of Arts and Sciences – Limited to graduate students, primarily for doctoral students.<br>School of Business – Limited to doctoral students. |
| 700s | The 700 series is an ongoing program of curriculum innovation. The series includes courses taught by distinguished University Professors. |
| 801 | This number designates Dean's Seminar courses. |

**The Law School**

***Before June 1, 1968:***

| | |
|---|---|
| 100 to 200 | Required courses for first-year students. |
| 201 to 300 | Required and elective courses for Bachelor of Laws or Juris Doctor curriculum. Open to master's candidates with approval. |
| 301 to 400 | Advanced courses. Primarily for master's candidates. Open to LL.B or J.D. candidates with approval. |

***After June 1, 1968 through Summer 2010 semester:***

| | |
|---|---|
| 201 to 299 | Required courses for J.D. candidates. |
| 300 to 499 | Designed for second- and third-year J.D. candidates. Open to master's candidates only with special permission. |
| 500 to 850 | Designed for advanced law degree students. Open to J.D. candidates only with special permission. |

**School of Medicine and Health Sciences and**
**School of Public Health and Health Services before Fall 2010 semester:**

| | |
|---|---|
| 001 to 200 | Designed for students in undergraduate programs. |
| 201 to 800 | Designed for M.D., health sciences, public health, health services, exercise science and other graduate degree candidates in the basic sciences. |

**CORCORAN COLLEGE OF ART + DESIGN**

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Courses taken through the Consortium are recorded using the visited institutions' department symbol and course number in the first positions of the title field. The visited institution is denoted with one of the following GW abbreviations.

| | | | |
|---|---|---|---|
| AU | American University | MMU | Marymount University |
| CORC | Corcoran College of Art & Design | MV | Mount Vernon College |
| | | NVCC | Northern Virginia Community College |
| CU | Catholic University of America | PGCC | Prince George's Community College |
| GC | Gallaudet University | SEU | Southeastern University |
| GU | Georgetown University | TC | Trinity Washington University |
| GL | Georgetown Law Center | USU | Uniformed Services University of the Health Sciences |
| GMU | George Mason University | | |
| HU | Howard University | UDC | University of the District of Columbia |
| MC | Montgomery College | UMD | University of Maryland |

**GRADING SYSTEMS**

**Undergraduate Grading System**

*A,* Excellent; *B,* Good; *C,* Satisfactory; *D,* Low Pass; *F,* Fail; *I,* Incomplete; *IPG,* In Progress; *W,* Authorized Withdrawal; *Z,* Unauthorized Withdrawal; *P,* Pass; *NP,* No Pass; *AU,* Audit. When a grade is assigned to a course that was originally assigned a grade of *I,* the *I* is replaced by the final grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
*Effective Fall 2011:* The grading symbol RP indicates the class was repeated under Academic Forgiveness.
*Effective Fall 2003:* The grading symbol R indicates need to repeat course.
*Prior to Summer 1992:* When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I/* and the grade.
*Effective Fall 1987:* The following grading symbols were added*: A-, B+, B-, C+, C-, D+, D-.*
*Effective Summer 1980:* The grading symbols: *P,* Pass, and *NP,* No Pass, replace *CR,* Credit, and *NC,* No Credit.

**Graduate Grading System**

(Excludes Law and M.D. programs.) *A,* Excellent; *B,* Good; *C,* Minimum Pass; *F,* Failure; *I,* Incomplete; *IPG,* In Progress; *CR,* Credit; *W,* Authorized Withdrawal; *Z,* Unauthorized Withdrawal; *AU,* Audit. When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
*Effective Fall 1994:* The following grading symbols were added: *A-, B+, B-, C+, C-* grades on the graduate level.

**Law Grading System**

*A+, A, A-,* Excellent; *B+, B, B-,* Good; *C+, C, C-,* Passing; *D,* Minimum Pass; *F,* Failure; *CR,* Credit; *NC,* No Credit; *I,* Incomplete. When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.

**M.D. Program Grading System**

*H,* Honors; *HP,* High Pass; *P,* Pass; *F,* Failure; *IP,* In Progress; *I,* Incomplete; *CN,* Conditional; *W,* Withdrawal; *X,* Exempt, *CN/P,* Conditional converted to Pass; *CN/F,* Conditional converted to Failure. Through Summer 2014 the *I* was replaced with *I* and the final grade.

For historical information not included in the transcript key, please visit http://www.gwu.edu/transcriptkey

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Caroline Uehling is a thoughtful and engaged law student who leans into hard work. She will be a valuable addition to whatever field of law she chooses to pursue, and any legal employer would be lucky to have her.

Caroline was one of the best students in the "Domestic Terrorism" class that I co-taught at George Washington University's Law School. The class was a seminar that focused on crafting practical policy solutions that would pass legal muster. My co-professor and I are adjuncts. Our day jobs are at the Department of Justice's National Security Division, where we both focus on domestic terrorism. Caroline contributed greatly to the class, and to her classmates. She was not always the most talkative student—a relatively easy feat, in any event—but she was consistently one of the most thoughtful—a far harder challenge.

The rapidly evolving, multifaceted nature of the domestic terrorism threat admittedly makes for a challenging class. Our students not only had to master the basics of applicable criminal law, but also become quick-study experts in subject matters ranging from First Amendment protections to the bureaucracy of the national security state to some of the worst moments in American history. Furthermore, for their final project, students could not simply regurgitate the debates they had in class, but had to undertake significant additional research to complete a lengthy paper on a topic of their choosing.

For her paper, Caroline chose to tackle not one but two complex areas: the scope of the First Amendment as it relates to responses to domestic terrorism, and how that scope compares to the laws and practices of our close counterterrorism ally, the United Kingdom. Relying on a robust array of governmental, judicial, and academic sources from both here and across the pond, Caroline did an excellent job and earned one of the top grades in the class. I was especially impressed by her ability to incorporate principles from international agreements such as the International Convention on Civil and Political Rights in making her arguments concerning social media regulations. The paper displayed Caroline's passion for international law, a topic in which I understand she has excelled in other classes as well.

In short, Caroline is a cogent and cheerful legal thinker who shows great promise.

Please do not hesitate to contact me for any further information.

Sincerely,

Colin T. Ross
Attorney Advisor, Office of Law & Policy
National Security Division, U.S. Dep't of Justice
Colin.Ross@usdoj.gov
202-514-5148

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Caroline “Carly” Uehling for a clerkship. Carly is a bright and capable second year law student who would be an invaluable asset your chambers.

Carly was my student in my first year Fundamentals of Lawyering class at The George Washington University Law School. This is a year-long course and she was one of 16 students in this small class. I have gotten to know Carly well both inside and outside the classroom during her first two years at GW. I feel qualified to appraise her writing skills, analytical ability, professional judgment, and work ethic, among other qualities.

Carly’s academic credentials speak for themselves: she is a summa cum laude graduate of The George Washington University and a Thurgood Marshall Scholar at GW Law. She certainly has the aptitude and acumen for a clerkship and, in my view, the personal characteristics as well.

Fundamentals of Lawyering encompasses the traditional legal research and writing curriculum, but filters it through a client service lens. Students represent a “client” in the fall and the spring and focus on “solving a problem” for their client and communicating those solutions. Carly is a strong writer and a sound analytical thinker. She’s a particularly strong predictive writer and her objective memos are clear, concise, and structured well. She’s therefore particularly well-suited to writing bench memos and judicial opinions.

Carly noted that she was “not a particularly talkative person.” Over the course of the year, however, she came out of her shell and made thoughtful contributions to class without prompting. Her quiet, humble, unassuming demeanor is, in a word, refreshing and I have seen her quiet confidence grow in the time I have known her. She is a listener and observer rather than a talker, but through her writing and her class contributions when called upon, she makes clear that she does not miss a beat.

Indeed, she was one of the two strongest writers in my section and I nominated her to be an upper level Writing Fellow to assist first year students with their writing. In this capacity, she worked one-on-one to mentor and tutor students on their writing assignments. She thrived in that role and many first year students returned to her throughout the year to seek more advice.

On a personal note, Carly is a quiet leader in the classroom who is liked and respected by her peers. She was a thoughtful contributor to class discussions and a cooperative team player during group exercises. Carly excels at giving her peers feedback on their written work to make it stronger and always receives feedback thoughtfully on her own writing.

Outside of law school, Carly loves baseball (especially the Phillies) and recently traveled to Florida for Spring Training. She plays the trombone, gardens, and propagates plants. Carly’s grandfather, a D-Day survivor, inspired her interest in World War II history. Her favorite class in her undergraduate studies was about the history of the Normandy invasion and she interned at the Albert H. Small Institute. I highlight these diverse interests because with Carly, there is more than meets the eye. And speaking to her always reveals a different interest that she engages with beyond the surface level.

When I asked Carly why she came to law school, she wrote: “I think lawyers have far more agency to respond to certain problems facing the country/world than people without an understanding of our legal system.” Her awareness of a lawyer’s responsibility to the profession belies her young age and relative lack of legal experience. I think this quote captures the thoughtfulness and intentionality with which Carly approaches her legal studies.

Carly's skills and personality traits will make Carly a successful clerk and the type of lawyer our profession needs more of. I recommend her without reservation. If I can provide more information about her qualifications, please do not hesitate to contact me.

Sincerely.

Erika N. Pont

Associate Professor
Interim Associate Director, Fundamentals of Lawyering Program
The George Washington University Law School
202-412-9696
epont@law.gwu.edu

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write with great enthusiasm to recommend Caroline "Carly" Uehling for a clerkship in your chambers. Carly took my Evidence course in Fall 2022, and was a standout student in class, with unfailingly well-timed and on-point comments. She also received an excellent grade in the class, performing in the top 15–20% of a highly competitive 80-person class. She excelled on the multiple choice questions (relatively straightforward applications of evidence law), the hypothetical questions (very complex issue-spotters), and the policy question (which required in-depth application of the law to a real-world issue). It is unusual for a student to do so well on all three types of writing and thinking, especially under tight time pressure.

I have had the opportunity to talk with Carly on a number of occasions about her goals and interests. One of the experiences from which she has learned the most is her work in the U.S. District Court for the District of Maryland in Baltimore, where worked this past summer. In that capacity, she had an opportunity to draft orders and memoranda, and developed a particular facility for prisoners' civil rights cases—a testament to her ability to parse complex legal issues.

Additionally, beginning while she was an undergraduate and continuing into law school, Carly has spent several months at Gilbert Employment Law. Gilbert is a medium-sized law firm in Silver Spring, Maryland that handles a range of employment issues, including EEOC matters, whistleblower claims, and other employment matters in both the public and private sector. Carly began working there in 2018, and over the numerous stints she has spent at the firm, Carly has been entrusted with increasingly important matters. She began by organizing documents and sitting in on client meetings, and by 2021, she was conducting initial consultations, taking depositions, and meeting with clients herself. Carly's dedication to the firm, and her interest in working closely with the same group of people over time, illustrates something powerful about the way I believe she would contribute to a productive work atmosphere in chambers: when Carly becomes part of something, she is extremely dedicated to it. This summer, Carly will be taking on a particularly challenging job, working for the Military Commissions Defense organization on the defense team for a detainee at Guantanamo Bay. Her interest in challenging herself and taking on new experiences and increasingly complex cases will also serve her well as a clerk.

Over her time in law school, Carly has sought out and exceled in many different activities and experiences. She was selected as Articles Editor of The George Washington Law School Law Review, which is a particularly important and challenging role on a prestigious journal. In this capacity, she has fine-tuned her editing skills and also become familiar with a wide range of legal scholarship, practice areas, and writing styles. Additionally, she works as both a Writing Fellow and a Civil Procedure tutor; a Research Assistant to Professor Miriam Galston, and also volunteers for the International Refugee Assistance Project. This range of commitments is impressive for its number, but even more so for its range. It has allowed Carly to cultivate a broad variety of strengths that will serve her well as a lawyer, including her written skills, analytical skills, research skills, and interpersonal skills as a collaborator.

Carly's academic prowess is also evidenced in her GPA, which has been consistently solid every semester; this performance is particularly impressive given her selection of challenging doctrinal classes: Administrative Law, International Law, Evidence, Criminal Procedure, and many others. Carly has been named a Thurgood Marshall Scholar (ranked in the top 16%–35% of students in her class) every semester so far in law school. The consistency of her performance is typical of everything I know about her: Carly comes to every class, meeting, and experience extremely well-prepared. Her manner is extremely low-key, friendly, and collaborative, and she strikes me as a person who works hard, possesses a keen intelligence, and is not easily ruffled.

In sum, Carly is precisely the sort of clerk I would want in chambers. I am happy to elaborate further if you think it would be useful. My cell number is (650) 862-5194. Please feel free to email or call any time.

Sincerely yours,

Kathryne M. Young
Associate Professor of Law
The George Washington University Law School
kyoung2@law.gwu.edu
(202) 994-3099

**Caroline Uehling**
16 Snows Ct NW ● Washington, DC 20037 ● (267) 886-3167 ● carolineuehling@law.gwu.edu

**Writing Sample**

The following writing sample is an excerpt of my Note entitled: "Dropped Third Strike? Preparing the Prison Litigation Reform Act for the Next Pandemic." I found inspiration for this topic while reviewing prisoner civil rights complaints during my summer internship with the Pro Se Staff Attorney's Office for the U.S. District Court for the District of Maryland. I omitted Part III, which proposes a judicial and legislative solution to the problems outlined in the previous two parts. While the work is entirely mine, I received minor feedback from my professor, my Notes Editor, and peers as part of the regular Note-writing process.

*"Like much of society, these residents watched the news and saw the President of the United States and the Governor of New Jersey imploring – and in some instances requiring - all Americans to practice 'social distancing,' to avoid congregating in groups, to wash their hands and use hand sanitizer regularly, to disinfect frequently touched surface, and to seek prompt medical attention if symptoms develop. Unlike the rest of society… DOC residents cannot."*[1]

**Introduction**

When the COVID-19 pandemic broke out in the United States in March 2020, prisons and jails were by their nature particularly susceptible to the spread of the virus.[2] Prisons and jails are frequently overcrowded and have limited access to quality healthcare.[3] The simplest way to reduce potential spread in prisons was through reducing the prison population, and while many state prisons notably lowered their populations, they achieved this primarily through reduced prison admissions rather than increased releases.[4] Even states with reduced prison populations were not able to accommodate social distancing and quarantine.[5] The death rate from COVID-19 in prisons during its first year reaching twice that of the death rate in the general U.S. population reflected the severe cost of the failure to stop the spread of the virus in prisons.[6]

When prison conditions are particularly deficient, incarcerated people can invoke the Eighth Amendment's protections against cruel and unusual punishment.[7] Historically, incarcerated people challenged prison conditions under the Civil Rights Act of 1871, 42 U.S.C. § 1983, which authorizes lawsuits against state or local officials who violate constitutional rights

[1] Complaint at 4-5, Brown v. Warren, No. 1:20-cv-07907-NLH-AMD (D. N.J. June 26, 2020).
[2] *Reducing Jail and Prison Populations During the Covid-19 Pandemic*, THE BRENNAN CENTER FOR JUSTICE, https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic (Mar. 27, 2020).
[3] *Id*.
[4] Emily Widra, *State prisons and local jails appear indifferent to COVID outbreaks, refusing to depopulate dangerous facilities*, PRISON POLICY INITIATIVE, https://www.prisonpolicy.org/blog/2022/02/10/february2022_population/ (Feb 10, 2022).
[5] *Id*.
[6] *Id*.
[7] U.S. CONST. amend. VIII.

while acting under the color of the law.[8] However, in recent decades, it has become increasingly difficult for incarcerated people to turn to federal courts to vindicate their constitutional rights.[9]

The Prison Litigation Reform Act ("PLRA"), which passed in 1996, severely curtailed the recourse of prisoners in federal courts.[10] Because Congress worried that it was easy for prisoners to bog down federal courts with frivolous lawsuits, it created new barriers such as an administrative exhaustion requirement and a requirement that indigent plaintiffs proceeding *in forma pauperis*[11] pay all filing fees through a payment plan.[12] Most notably for the purposes of this Note, it also created a "three strike" rule.[13] If plaintiffs have three lawsuits dismissed for being frivolous, malicious, or failing to state a claim, they can no longer utilize *in forma pauperis* status, even though the initial suits certified their inability to pay.[14] Some circuits interpret this provision broadly, considering even dismissals under *Heck v. Humphrey*, which requires plaintiffs to successfully challenge their criminal convictions before raising § 1983 claims about the same circumstances,[15] to be dismissals for failure to state a claim.[16] Furthermore, although the PLRA creates an exception to the three-strike requirement when there is imminent danger to the plaintiff,[17] it creates no similar exception for special circumstances or

[8] William H. Danne, *Prison Conditions as Amounting to Cruel and Unusual Punishment*, 51 A.L.R.3d 111.
[9] *See*, *e.g.*, Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003); Margo Schlanger, *Trends in Prisoner Litigation as the PLRA Approaches 20*, CORRECTIONAL LAW REPORTER, https://www.law.umich.edu/facultyhome/margoschlanger/Documents/Publications/Trends%20in%20Prisoner%20Litigation%20as%20the%20PLRA%20Aproaches%2020.pdf.
[10] Rachel Poser, *Why It's Nearly Impossible for Prisoners to Sue Prisons*, THE NEW YORKER, https://www.newyorker.com/news/news-desk/why-its-nearly-impossible-for-prisoners-to-sue-prisons (May 30, 2016).
[11] Plaintiffs proceeding *in forma pauperis* are unable to provide security for the payment of the costs of the lawsuit due to poverty. In general, statutes ensure that such plaintiffs can file lawsuits by requiring the government to pay court fees or waiving the prepayment of fees. E.E. Woods, *What costs or fees are contemplated by statute authorizing proceedings in forma pauperis*, 98 A.L.R.2d 292 (2023).
[12] Margo Schlanger, *Trends in Prisoner Litigation as the PLRA Approaches 20*, *supra* note 9, at 70.
[13] *Id*.
[14] *Id*.
[15] Heck v. Humphrey, 512 U.S. 477, 478-479 (1994).
[16] Garrett v. Murphy, 17 F.4th 419 (3rd Cir. 2021); Teagan v. City of McDonough, 949 F.3d 670, 677 (11th Cir. 2020); O'Brien v. Town of Bellingham, 943 F.3d 514, 529 (1st Cir. 2019).
[17] 28 U.S.C. § 1915(g).

public health crises.[18] The Eleventh Circuit even interprets the PLRA to prevent the joinder of parties under Federal Rule of Civil Procedure ("FRCP") 20,[19] despite the lack of language in the PLRA supporting that provision.[20]

This Note argues that the PLRA has created a legacy of not simply filtering the prisoner civil rights complaints that reach federal courts, but of barring meritorious claims. In particular, the three-strike provision prevents courts from exercising oversight over potentially unconstitutional conditions in prisons simply because a plaintiff raised complaints with deficiencies in the past.[21] Although courts invoke the purposes of the PLRA when determining the application of the three-strike provision, the numerous circuit splits regarding application demonstrate the uncertainty of legislative intent in multiple contexts.[22] Courts that broadly award litigants strikes and then bar prisoner plaintiffs from joining under FRCP 20 through their interpretation of the strike rule are not protecting federal courts from frivolous prisoner complaints. Instead, these interpretations hinder the practical process of raising legitimate claims. The COVID-19 pandemic demonstrates the importance of allowing legitimate conditions complaints to reach federal courts.[23] Additionally, conditions complaints against the broad treatment of inmates are well-suited for joinder. Judicial interpretation may be the only avenue for broadening access, but legislative action may be possible if Congress recognizes how inmate litigation can converge with the public interest. Because interpreting the three-strikes provision

[18] *See infra* Part III.B.
[19] Hubbard v. Haley, 262 F.3d 1194 (11th 2001).
[20] The three-strike provision does not address joinder. *See* 28 U.S.C. § 1915(g).
[21] *See* The Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104–134, tit. VIII, 110 Stat. 1321 (1996) (codified in part at 28 U.S.C. § 1915) at § 1915(g)
[22] 4 RICHARD D. FREER, FEDERAL PRACTICE - CIVIL *§ 20.10* (2023).
[23] *See* Margo Schlanger & Betsy Ginsberg, *AEDPA and the PLRA After 25 Years: Pandemic Rules: COVID-19 and the Prison Litigation Reform Act's Exhaustion Requirement*, 72 CASE W. RES. 533, 562-563 (2022) (arguing that "justice requires" easing the administrative exhaustion requirement of the PLRA during emergency circumstances because failed COVID-19 legislation shows how the PLRA closed courthouse doors to important complaints).

of the PLRA broadly halts potentially meritorious, important complaints before they reach federal courts, courts should not count *Heck* dismissals as strikes and Congress should create a specific exception to the three-strike provision for plaintiffs joined to raise public health-related conditions complaints.

Part I of this Note describes COVID-19 in prisons and outlines the passage, provisions, and general criticism of the PLRA. Part II details the three-strike provision, questions about how the provision applies to certain types of dismissals and the Supreme Court's ruling in *Heck v. Humphrey*, and the debate over applying FRCP 20 to prison litigation following the PLRA. Part III proposes that courts should adopt a narrow interpretation of the three-strike provision and that Congress should enact an exception to the three-strike provision for specific joint litigation, which would allow incarcerated individuals to both hold officials accountable when their conditions are unexpectedly imperiled and protect the wider community.

## I. COVID-19 in Prisons and The Prison Litigation Reform Act

When the coronavirus entered jails and prisons, the inherent conditions of incarceration made transmission likely and many officials lacked resources to even begin taking preventative measures.[24] Although the prison litigation that arose out of these circumstances theoretically presented just the type of inconvenience Congress anticipated when creating the PLRA,[25] Congress failed to anticipate that prison conditions do not simply harm incarcerated individuals.[26] Prisons are not isolated from the outside world, and problems like infectious diseases that proliferate in prisons will spread to the deficient infrastructure of the surrounding

[24] *Covid-19's Impact on People in Prison*, EQUAL JUSTICE INITIATIVE (Apr. 16, 2021) https://eji.org/news/covid-19s-impact-on-people-in-prison/.
[25] The declared purpose of the PLRA was to help overburdened courts. Schlanger, *Inmate Litigation*, *supra* note 9, at 1565-1566.
[26] The passage of the PLRA focused on litigants and courts, not the wider impact of litigation. *See id*.

communities.[27] This Part will explain the impact of the coronavirus on prisons, attempts at § 1983 coronavirus suits, and the passage and impact of the PLRA.

**A. COVID-19 in Prisons**

Incarcerated individuals are particularly vulnerable to communicable diseases due to the inherent conditions of their confinement, and that problem was exacerbated in the early months of the COVID-19 pandemic.[28] Data collected by The Marshall Project and The Associated Press suggested that by December 2020, one in every five federal and state prisoner had contracted the coronavirus.[29] According to the Bureau of Justice Statistics, between March 2020 and February 2021, approximately 2,500 state and federal prisoners died of COVID-19-related cases.[30] Forty-four percent of COVID-19-related deaths were white incarcerated individuals, while thirty-four percent were Black individuals.[31] During this period 396,300 viral tests were positive, accounting for an 8.2 percent positive rate in state and federal prisons.[32]

The prison population presented a unique challenge in the United States because of its disproportionate size and particular vulnerability.[33] Although countries throughout the world faced questions about how to prevent the spread of a virus in confined correctional

[27] Anna Flagg & Joseph Neff, *Why Jails Are So Important in the Fight Against Coronavirus*, N.Y. TIMES (March 31, 2020) https://www.nytimes.com/2020/03/31/upshot/coronavirus-jails-prisons.html?searchResultPosition=1.
[28] *Covid-19's Impact on People in Prison*, Equal Justice Initiative (Apr. 16, 2021) https://eji.org/news/covid-19s-impact-on-people-in-prison/.
[29] Beth Schwartzapfel, Katie Park, & Andrew Demillo, *1 in 5 Prisoners in the U.S. Has Had COVID-19*, THE MARSHALL PROJECT (Dec. 18, 2020) https://www.themarshallproject.org/2020/12/18/1-in-5-prisoners-in-the-u-s-has-had-covid-19.
[30] BUREAU OF JUSTICE STATISTICS, IMPACT OF COVID-19 ON STATE AND FEDERAL PRISONS, MARCH 2020-FEBRURAY 2021, 1 https://bjs.ojp.gov/library/publications/impact-covid-19-state-and-federal-prisons-march-2020-february-2021.
[31] *Id*. at 1.
[32] *Id*.
[33] *See* Benjamin A. Barsky et. al., *Vaccination plus Decarceration—Stopping Covid-19 in Jails and Prisons*, N. ENGL. J. OF MED. 1583 (2021); Weihua Li & Nicole Lewis, *This Chart Shows Why the Prison Population is So Vulnerable to COVID-19*, THE MARSHALL PROJECT (March 19, 2020) https://www.themarshallproject.org/2020/03/19/this-chart-shows-why-the-prison-population-is-so-vulnerable-to-covid-19.

environments, U.S. jails and prisons were responsible for twenty-five percent of the world's incarcerated individuals.[34] In addition to the tight quarters of prisons, there was also constant movement that encouraged the spread of the virus.[35] Public health experts urged that the most effective way to prevent the spread of COVID-19 in prisons was through decarceration; early statistics indicated that decarceration did not lead to an increase in rearrest rates, and diminishing the spread of the virus had the greatest impact on the health and safety of the communities near prisons.[36] For example, a nine percent reduction in the carceral population was associated with a fifty-six percent decrease in transmission.[37] Public health experts warned that extensive measures were necessary because even when vaccines became available, it would not guarantee an end to the virus within prisons.[38] If incarcerated individuals were prioritized in vaccine rollouts, even highly effective vaccines could not prevent the spread of viruses completely in "high-spread, congregate settings."[39] Furthermore, incarcerated individuals would be particularly likely to be vaccine hesitant, as they had reduced access to information and a distrust of the institution responsible for their incarceration.[40]

The United States also faced the challenge of an aging prison population that was more susceptible to complications from contracting the virus.[41] Although in the past young adults between the ages of eighteen and twenty-four made up a larger percentage of the state prison population, this changed as the population of state prisons, incarcerated from the harsh sentencing laws of the 1980s and 1990s, aged.[42] In fact, the percentage of people in state prisons

[34] Barsky, *supra* note 33 at 1583.
[35] *Id*.
[36] *Id*.
[37] *Id*. at 1585.
[38] *Id*. at 1584.
[39] *Id*.
[40] *Id*. at 1584-1585.
[41] Li & Lewis, *supra* note 33.
[42] *Id.*

fifty-five and older tripled between 2000 and 2016.[43] Compounding this issue, older individuals were also more likely to have chronic conditions, which correctional facilities frequently lacked the resources to treat.[44]

In response to the pandemic, the Center for Disease Control ("CDC") issued guidance for people living in jails and prisons.[45] The guidance recommended that incarcerated individuals get vaccinated; maintain physical distance by avoiding crowds and distancing during recreation, mealtime, and when walking in hallways; wear a mask when around staff or people from a different housing unit; and wash hands with soap and water for twenty seconds.[46] In recognition of the abundant common areas in prisons, the CDC recommended going outside for recreation time and sleeping head to foot if there was more than one bed in the room.[47] However, these measures, minimal to begin with, were not always implemented in practice.[48]

The impact of the high transmission rate of the coronavirus among incarcerated individuals spread beyond the walls of prisons.[49] There is enormous turnover in jails, which have a far less stable population than prisons; on average, 200,000 people enter jails and about the same number exit jails every week.[50] Contact with non-incarcerated individuals is unavoidable, as workers must interact with incarcerated people.[51] In small towns that house prisons, large

[43] *Id*. In this article, Li and Lewis note that 2016 is the most recent date when this detailed data is available. The data is, however, indicative of the present trend in correctional populations.
[44] *Id*.
[45] CENTER FOR DISEASE CONTROL, FOR PEOPLE LIVING IN PRISONS AND JAILS (Sept. 3, 2021) https://permanent.fdlp.gov/gpo159641/www.cdc.gov/coronavirus/2019-ncov/downloads/needs-extra-precautions/For-People-Living-in-Prisons-and-Jails.pdf.
[46] *Id*. at 2.
[47] *Id*. at 3.
[48] *Infra* Part I.B.
[49] *See* Flagg & Neff, *supra* note 27.
[50] *Id*.
[51] *Id*.

percentages of the population work in the prisons.[52] Small towns also often have poor health infrastructure, which leads to high mortality rates even during times that do not constitute public health emergencies.[53] Throughout the COVID-19 pandemic, prisoner litigants have attempted to halt the pandemic's impact by filing civil rights lawsuits.[54]

**B. COVID-19 § 1983 Lawsuits**

In response to inadequate housing conditions during the pandemic in jails and prisons, many incarcerated individuals brought civil rights claims under § 1983.[55] In June 2020, eight inmates asserted that the Cumberland County Correctional Facility in New Jersey failed to provide staff with adequate cleaning supplies, instead relying on the Department of Corrections ("DOC") residents to clean personal and common areas without provisions of masks, gloves, or other equipment.[56] Given no cleaning supplies, residents were told to clean their cells with water and their own soap and towels used for bathing.[57] Additionally, the plaintiffs noted that despite residents exhibiting symptoms, they did not receive COVID-19 tests.[58] Facility officials then made statements about no inmates testing positive.[59] Social distancing was impossible because

[52] In the town of Homer, Louisiana, the population is 3,000: 1,244 individuals are incarcerated and 350 people work in the prison. Jonathan Ben-Menachem, *Coronavirus Exposes Precarity of Prison Towns*, THE APPEAL (Apr. 21, 2020) https://theappeal.org/coronavirus-prison-towns/.
[53] *Id*.
[54] *See* Brown v. Warren, No. 1:20-cv-07907-NLH-AMD (D. N.J. June 26, 2020); Complaint, Maney v. Brown, No. 6:20-cv-00570-SB (D. Or. Apr. 6, 2020); Complaint, Frazier v. Kelley, No. 4:20-cv-00434 (E.D. Ark. Apr. 21, 2020); Complaint, Waddell v. Taylor, No. 5:20-cv-00340 (S.D. Miss. May 14, 2020); Compliant, Hanna v. Peters, No. 2:21-cv-00493-SB (D. Or. Apr. 1, 2021).
[55] *See* Brown v. Warren, No. 1:20-cv-07907-NLH-AMD (D. N.J. June 26, 2020); Complaint, Maney v. Brown, No. 6:20-cv-00570-SB (D. Or. Apr. 6, 2020); Complaint, Frazier v. Kelley, No. 4:20-cv-00434 (E.D. Ark. Apr. 21, 2020); Complaint, Waddell v. Taylor, No. 5:20-cv-00340 (S.D. Miss. May 14, 2020); Compliant, Hanna v. Peters, No. 2:21-cv-00493-SB (D. Or. Apr. 1, 2021).
[56] Brown v. Warren, No. 1:20-cv-07907-NLH-AMD, at 12.
[57] *Id*.
[58] *Id*. at 14.
[59] *Id.*

cells housed two people and the only time inmates could leave their cells was to be in common areas, where congregation was inevitable.[60]

While some § 1983 lawsuits focused on prisons' initial COVID-19 response,[61] others stated that correctional facilities failed to respond to the needs of inmates as the pandemic continued.[62] In Oregon, a plaintiff wrote that despite DOC policies mandating prison staff to wear masks when interacting with inmates, staff of the Two Rivers Correctional Institute disregarded the instructions and superiors made no attempt to enforce the requirements.[63] Furthermore, the prison implemented "pat down" procedures when inmates waited in halls for meal, which led to unmasked officers moving from inmate to inmate while wearing the same gloves.[64]

Although these suits are all ongoing, many similar lawsuits ran into the barriers imposed by the PLRA.[65] Plaintiffs barred from bringing claims under the PLRA due to their past filing history cannot reach an adjudication on the merits of their conditions complaints.[66]

**C. The "Explosion" of Prison Litigation and the Passage of the PLRA**

There are several avenues through which incarcerated people can pursue litigation in federal court either by challenging their convictions or the conditions of their incarceration.[67]

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[60] *Id*. at 15.
[61] *See* Complaint, Maney v. Brown, No. 6:20-cv-00570-SB (D. Or. Apr. 6, 2020); Complaint, Frazier v. Kelley, No. 4:20-cv-00434 (E.D. Ark. Apr. 21, 2020); Complaint, Waddell v. Taylor, No. 5:20-cv-00340 (S.D. Miss. May 14, 2020).
[62] *See* Complaint at 6, Hanna v. Peters, No. 2:21-cv-00493-SB (D. Or. Apr. 1, 2021).
[63] *Id*.
[64] *Id*. at 4.
[65] *See, e.g.*, Garrett v. Murphy, 17 F.4th 419 (3rd Cir. 2021); Schlanger & Ginsberg, *supra* note 23, at 537 (describing how the PLRA's exhaustion requirement halted COVID-19 lawsuits).
[66] *No Equal Justice: The Prison Litigation Reform Act in the United States*, THE APPEAL https://theappeal.org/the-lab/explainers/how-the-prison-litigation-reform-act-has-failed-for-25-years/.
[67] Federal district courts can grant writs of habeas corpus when a prisoner "is in custody in violation of the Constitution or laws or treaties of the United States." Michael L. Zuckerman, *When the Conditions are the Confinement: Eighth Amendment Habeas Claims During COVID-19*, 90 U. CIN. L. REV. 1, 6 (2021) (citing 28 U.S.C. § 2241(a)). Inmate civil rights litigation often involves complaints of physical assaults by other inmates or staff, inadequate medical care, disciplinary actions lacking adequate due process, and generally poor living-conditions, but complaints sometimes refer to freedom of religion or speech.

Most relevantly, prisoners can bring lawsuits when their rights were deprived by a state actor under 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State… subjects, or causes to be subjected, any citizen… to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . [68]

Under § 1983, individuals can sue defendants acting on behalf of the state or local government.[69] Although people can bring § 1983 suits against local or state officials for many reasons, such as the violation of Fourth or Eighth Amendment rights during an arrest, the statute is particularly significant for individuals incarcerated in state prisons, who can bring claims against the officials operating those prisons.[70] Prisoners can bring civil rights complaints under § 1983 if they experience cruel and unusual punishment in violation of either their constitutional rights under the Eighth Amendment, in the case of incarcerated individuals, or under the Fourteenth Amendment, in the case of pretrial detainees.[71]

Congress determined it needed to modify this process, however, because the latter half of the twentieth century saw a marked increase in the number of § 1983 suits and related federal lawsuits.[72] In 1970, there were 2,244 prisoner civil rights complaints filed in federal district

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Schlanger, *Inmate Litigation*, supra note 9, at 1571. Although inmates used both avenues during the pandemic, this Note focuses on civil rights litigation, which provides different remedies than habeas petitions.

[68] 42 U.S.C. § 1983.

[69] *Id*. These are distinct from suits against federal employees, which are *Bivens* actions. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

[70] Helling v. McKinney, 509 U.S. 25 (1993).

[71] Helling v. McKinney, 509 U.S. 25 (1993) (alleging that defendants, with deliberate indifference, exposed plaintiff to unreasonable risks for future health stated Eighth Amendment claim for which relief could be granted); Hutto v. Finney, 437 U.S. 678 (1978) (finding conditions in prison system constituted cruel and unusual punishment in violation of Eighth and Fourteenth Amendments).

[72] BERNARD D. REAMS, JR. AND WILLIAM H. MANZ, *Introduction*, A LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996, at iii (1997).

courts.[73] By 1995, that number increased to 39,053.[74] At the same time, the total incarcerated population in the United States grew from 359,419 to 1,597,044.[75] Therefore, the rate of filings per 1,000 incarcerated people grew from 6.2 to 24.5 filings.[76] Due to the screening burden prison litigation, which was usually filed *pro se* and *in forma pauperis* and decided during pleading stages, placed on district courts, Congress determined that legislation was necessary to improve case management.[77] In 1996, Congress passed the PLRA with the intention of curbing an increase in prison litigation.[78] However, it was somewhat misguided in attributing the increased burden on federal courts entirely on lawsuits from incarcerated individuals. Rather, the tripling of the U.S. prison and jail population from 1980 to 1995 burdened the capacity of federal courts to address prison litigation, not simply an increased desire to litigate from the prison population.[79] The filing rate actually declined in the 1980s after rising in the 1970s, but the filing rates rose again between 1990 and 1995.[80] Even when filing rates rose, prisoners were filing lawsuits at a similar rate to non-incarcerated people while being exposed to more potentially dangerous situations.[81]

The legislation both barred lawsuits and made positive outcomes less likely.[82] To prevent prisoners from attempting to bring lawsuits, the PLRA increased filing fees, prevented

[73] *Id.*; Margo Schlanger, *Incarcerated Population and Prison/Jail Civil Rights/Conditions Filings, FY 1970 – FY 2021*, INCARCERATION LAW, https://incarcerationlaw.com/resources/data-update/#TableA.
[74] Schlanger, *Incarcerated Population and Prison/Jail Civil Rights/Conditions Filings, FY 1970 – FY 2021*, *supra* note 73.
[75] *Id*.
[76] *Id*.
[77] Reams, *supra* note 72, at iii.
[78] *Id*.
[79] Easha Anand, Emily Clark & Daniel Greenfield, *How the Prison Litigation Reform Act Has Failed For 25 Years*, THE APPEAL, https://theappeal.org/the-lab/explainers/how-the-prison-litigation-reform-act-has-failed-for-25-years/; *See* Schlanger, *Trends in Prisoner Litigation as the PLRA Approaches 20*, *supra* note 9, at 70-72.
[80] Schlanger, *Trends in Prisoner Litigation as the PLRA Approaches 20*, *supra* note 9, at 70.
[81] *No Equal Justice: The Prison Litigation Reform Act in the United States*, *supra* note 66.
[82] Schlanger, *Trends in Prisoner Litigation as the PLRA Approaches 20*, *supra* note 9, at 70.

individuals from filing until they had exhausted administrative remedies within the prison system, and implemented a three-strike rule requiring "frequent" lawsuit filers to produce filing fees regardless of their capacity to pay.[83] Moreover, it limited damages and attorney's fees.[84] It also required plaintiffs to suffer a physical injury to recover monetary damages; mental or emotional injuries were not adequate.[85]

Courts' interpretations of the PLRA's provisions have succeeded in curtailed both the filing and outcomes of prisoner suits.[86] The exhaustion rule requires that individuals seek accountability within the prison administrative system first, and courts largely discount the feasibility of prison grievances under the circumstances.[87] Although the Supreme Court has recognized that certain conditions make the administrative grievance process not "available" in practice, therefore waiving the requirement to exhaust, judges vary in their interpretation of what constitutes availability and sometimes require a high standard.[88] Following the PLRA's passage, the average rate of filings per 1000 inmates decreased from a range of 20.0-24.9 from 1990-1996 to a range of 9.6-15.1 between 1997 and 2014.[89]

Although critics of the PLRA acknowledge the reasonableness of limiting the number of frivolous claims in federal courts and maximizing the courts' productivity, reports show that provisions of the PLRA have led to dismissals of claims regarding sexual assault, intentional abuse by prison staff, and other serious injuries.[90] Because the United States does not have an independent national agency to monitor conditions in prisons and jails like many other

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[83] *Id*.
[84] *Id*.
[85] Anand, Clark, and Greenfield, *supra* note 79.
[86] *See* Schlanger, *Trends in Prisoner Litigation as the PLRA Approaches 20*, *supra* note 9, at 71.
[87] Anand, Clark, and Greenfield, *supra* note 79.
[88] Booth v. Churner, 532 U.S. 731, 741 (2001); Ross v. Blake, 578 U.S. 632, 643 (2016).
[89] Schlanger, *Trends in Prisoner Litigation as the PLRA Approaches 20*, *supra* note 9, at 71.
[90] Anand, Clark, and Greenfield, *supra* note 79.

democracies, federal courts play an important role in oversight and reform of conditions.[91] Additionally, because convicted prisoners are barred from voting in the vast majority of states, the Supreme Court has noted that the right of prisoners to federal courts is even more important: "the right to file a court action might be said to be [a prisoner's] remaining most fundamental political right, because preservative of all rights."[92] As prisoners cannot spur action through the executive or legislative branch, the judicial branch is the avenue that remains.

## II. Defining and Interpreting the PLRA's Three-Strike Rule

In 2020, Allen Dupree Garrett sued New Jersey state officials asserting that they kept him in pretrial detention with deliberate indifference to the imminent risk of contracting COVID-19, which violated his substantive due process rights.[93] He attempted to proceed *in forma pauperis*, which would allow the payment of filing fees over time.[94] However, this was not the first case Garrett attempted to file in federal court.[95] In 2014, he brought a § 1983 action challenging his prosecution, arrest, and conviction.[96] Three years later, Garrett brought a claim against his former defense attorneys and sentencing judge, and in 2019 he alleged a wrongful conviction.[97] Because of these entirely unrelated claims, which were unable to proceed under *Heck*, the Third Circuit determined that Garrett could not proceed *in forma pauperis*.[98] This Part details the three-strike rule, its interpretation, and its convergence with FRCP 20 and *Heck*.

[91] Anand, Clark, and Greenfield, *supra* note 79.
[92] *No Equal Justice: The Prison Litigation Reform Act in the United States*, *supra* note 66.
[93] Garrett v. Murphy, 17 F.4th 419, 423 (3rd Cir. 2021).
[94] *Id*.
[95] *Id*. at 426.
[96] *Id*.
[97] *Id*.
[98] *Id*. at 433.

**A. The Three Strike Provision**

Under the PLRA, inmate litigants may file for *in forma pauperis* status if they are unable to pay filing fees.[99] While this allows them to not pay initial filing fees up front, they are still required to pay the full filing fee through monthly payments determined by monthly income.[100] The PLRA created additional barriers for "frequent filers," requiring:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.[101]

In other words, an individual who has brought three unsuccessful claims—whether frivolous, malicious, or failing to state a claim—must pay filing fees upfront unless they are in imminent danger of serious physical injury.[102] The three-strike rule seems to rest on the assumption that the filing fees required in prisoner complaints are not too much to deter a meritorious claim but are enough to deter a meritless claim.[103] When introducing the bill, Senator Jon Kyl argued that it was proper to require inmate litigants to pay filing fees, stating:

> Section 2 will require prisoners to pay a very small share of the large burden they place on the Federal judicial system by paying a small filing fee upon commencement of lawsuit. In doing so, the provision will deter frivolous inmate lawsuits. The modest monetary outlay will force prisoners to think twice about the case and not just file reflexively. Prisoners will have to make the same decision that lawabiding Americans must make: Is the lawsuit worth the price?[104]

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[99] The Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104–134, tit. VIII, 110 Stat. 1321 (1996) (codified in part at 28 U.S.C. § 1915) at § 1915(g)
[100] 28 U.S.C. § 1915.
[101] 28 U.S.C. § 1915(g).
[102] *Id.*
[103] 141 CONG. REC. at S7526 (daily ed. May 25, 1995) (statement of Senator Kyl) ("The filing fee is small enough not to deter a prisoner with a meritorious claim, yet large enough to deter frivolous claims and multiple filings.").
[104] *Id.* (citation omitted).

Kyl suggests that having to pay for lawsuits would prevent prisoners from "filing reflexively" and reduce the burden such individuals place on federal courts.[105] In reality, however, if courts deny plaintiffs *in forma pauperis* status based on three previous dismissals, it is unlikely that the plaintiffs can file a lawsuit, regardless of its potential merits.[106]

Courts do not consider the filing fees imposed on prisoner litigants unconstitutional because Congress has historically controlled indigent litigant's access to the federal judicial system and access to the courts is subject to Congress's Article III power to limit federal jurisdiction.[107] As asserted by the Fourth Circuit in *Roller v. Gunn*, Congress created the first *in forma pauperis* statute in 1892 to give more Americans access to federal courts, but greater access led to more meritless lawsuits.[108] Congress recognized that the "explosion of [*in forma pauperis*] litigation" taxed the legal system and determined that the escalation of prisoner lawsuits derived from the "lack of economic disincentives to filing meritless cases."[109] Congress' power to create Article III courts does not compel it to guarantee free access or unlimited access.[110] The Fourth Circuit insisted that if the fee regime under the PLRA was considered unconstitutional, all other court filing fees would also be unconstitutional.[111]

Although the language of the PLRA is simple, its seemingly narrow provisions have wide implications that are unaddressed in its text.[112] The three-strike provision does not consider the length of an individual's incarceration and bars entry without regard for whether litigation was undertaken in good faith, impacting truly frivolous claims to the same degree as claims

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[105] *Id*.
[106] Anand, Clark, and Greenfield, *supra* note 79.
[107] Roller v. Gunn, 107 F.3d 227, 230 (4th Cir. 1997).
[108] *Id*. at 230.
[109] *Id*. at 230-231.
[110] *Id*. at 231.
[111] *Id*. at 231-232.
[112] *See* Melissa Benerofe, *Collaterally Attacking the Prison Litigation Reform Act's Application to Meritorious Prisoner Complaint Litigation*, 90 FDMLR 141, 164-165 (2021).

dismissed due to insufficiencies in pleading or procedural mistakes.[113] The Supreme Court held that the provision refers to any dismissal for failure to state a claim whether the case is dismissed with prejudice or without.[114]

There are also extreme disparities across circuits about what constitutes a strike, especially due to the phrase "fails to state a claim."[115] For example, circuits disagree about whether dismissals based on absolute and qualified immunity, dismissals for failure to exhaust, and mixed dismissals based on a § 1915(g) ground (frivolous, malicious, fails to state a claim) and in part on other grounds qualify as strikes.[116] The Third, Fourth, Seventh, Ninth, and District of Columbia Circuits determined that only dismissals based entirely on § 1915(g) grounds constitute strikes.[117] Meanwhile, the Sixth and Tenth Circuits allow mixed dismissals, such as those based partly on failure to exhaust and partly on § 1915(g) grounds, to count as strikes.[118]

Although courts disagree about application, three-strike caselaw demonstrates that the purpose of the PLRA serves as a crucial tool for resolving ambiguity when the statute's limited text lacks a plain meaning.[119] The Third Circuit, for example, recognized that Congress intended the PLRA to conserve the resources of federal courts and defendants.[120] Because the target of the

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[113] *Id*.
[114] Lomax v. Ortiz-Marquez, 140 S.Ct. 1721, 1723 (2020).
[115] Molly Guptill Manning, *Trouble Counting to Three: Circuit Splits and Confusion in Interpreting the Prison Litigation Reform Act's 'Three Strikes Rule*,' 28 U.S.C. § 1915(G), 28 CORNELL J.L. & POL'Y 207, 225 (2018); *See e.g.* Thomas v. Parker, 672 F.3d 1182, 1184 (10th Cir. 2012); Pointer v. Wilkinson, 502 F.3d 369, 376 (6th Cir. 2007).
[116] Manning, *supra* note 115, at 219.
[117] Manning, *supra* note 115, at 225; Washington v. Los Angeles Cty. Sheriff's Dep't, 833 F.3d 1048, 1057 (9th Cir. 2016); Byrd v. Shannon, 715 F.3d 117, 124-125 (3rd Cir. 2013); Turley v. Gaetz, 625 F.3d 1005, 1013 (7th Cir. 2012); Tolbert v. Stevenson, 635 F.3d 646, 652 (4th Cir. 2011); Thompson v. DEA, 492 F.3d 428, 432 (D.C. Cir. 2007); *See also* Samuel B. Reilly, *Where is the Strike Zone? Arguing for a Uniformly Narrow Interpretation of the Prison Litigation Reform Act's "Three Strikes" Rule*, 70 EMORY L.J. 755 (2021).
[118] Manning, *supra* note 115, at 224; Thomas v. Parker, 672 F.3d 1182, 1184 (10th Cir. 2012); Pointer v. Wilkinson, 502 F.3d 369, 376 (6th Cir. 2007).
[119] *See. e.g.*, 715 F.3d at 125; Thompson v. DEA, 492 F.3d 428, 437 (D.C. Circuit 2007).
[120] *See* 715 F.3d at 125 ("Our Court has not yet stated a preferred approach for deciding when and whether "unclear" dismissals can be counted as strikes for purposes of § 1915(g). In doing so now, we

PLRA was ill-intentioned plaintiffs, however, the D.C. Circuit argued that not all dismissals should be considered strikes, declining to adopt a per se rule designating dismissal for lack of jurisdiction as grounds for a strike.[121] The D.C. Circuit noted, "because understanding federal court jurisdiction is no mean feat even for trained lawyers, creating a rule that mechanically treats dismissals for lack of jurisdiction as strikes would pose a serious risk of penalizing prisoners proceeding in good faith and with legitimate claims."[122] In other words, prisoners representing themselves should not be penalized for not knowing certain legal rules.[123]

**B. Rule 20 and the PLRA**

Due to the requirements of the three-strike provision, some courts have interpreted the PLRA to further alter the rights of prisoner litigants by preventing them from filing joint suits[124] or imposing specific fee requirements for joint suits.[125] Rule 20 of the Federal Rules of Civil Procedure governs the joinder of plaintiffs and defendants in civil litigation.[126] Under Section 1,

> Persons may join in one action as plaintiffs if:
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> (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
> (B) any question of law or fact common to all plaintiffs will arise in the action.[127]

The Supreme Court applies a liberal standard to the permissive joinder of parties: "Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with

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are guided by the driving purpose of the PLRA—preserving resources of both the courts and the defendants in prison litigation.")

[121] 492 F.3d at 437; *See* Beatrice C. Hancock, Three Strikes and You're Still In? Interpreting the Three-Strike Provision of the Prison Litigation Reform Act in the Eleventh Circuit, 68 Mercer L. Rev. 1161, 1168 (2017).

[122] 492 F.3d at 437.

[123] *See id*.

[124] *See* Hubbard v. Haley, 262 F.3d 1194 (11th Cir. 2001).

[125] *See* Hagan v. Rogers, 570 F.3d 146 (3rd Cir. 2009); Boriboune v. Berge, 391 F.3d 852 (7th Cir. 2004).

[126] FED. R. CIV. P. 20.

[127] FED. R. CIV. P. 20.

fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."[128] Therefore, the default rule for joinder is to allow parties to proceed under one suit.[129]

The PLRA does not address the application of civil procedure to prison litigation, but some circuits assume that the requirements of the PLRA alter the application of Rule 20.[130] The statute does not discuss whether courts can join *in forma pauperis* prisoner complaints under Rule 20(a)(1) or how such a joinder would affect filing fees and strikes.[131] Therefore, even though joinder is generally liberally allowed, the Eleventh Circuit has determined that indigent prisoner plaintiffs cannot join under Rule 20.[132] The Third and Seventh Circuits articulate that plaintiffs can be joined so long as they pay full filing fees, while the Sixth Circuit allows both joinder of plaintiffs and the distribution of the filing fee among plaintiffs.[133]

In *Hubbard v. Haley*, the Eleventh Circuit concluded that the PLRA created a per se bar on the joinder of *in forma pauperis* incarcerated plaintiffs because it viewed the strike scheme as incompatible with joinder.[134] The purpose of the PLRA was to limit "abusive" prisoner civil rights and conditions of confinement litigation.[135] The text of the PLRA requires prisoners bringing civil actions *in forma pauperis* to pay a full filing fee, indicating Congress's focus on each prisoner paying the full amount.[136] Because such plaintiffs must pay full filing fees, the Eleventh Circuit denied that the plaintiffs could join in a single action.[137] The Eleventh Circuit's justification, however, does not explain why this perceived issue could not be rectified by

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[128] United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966).
[129] *See id*.
[130] *See* Hubbard v. Haley, 262 F.3d 1194 (11th Cir. 2001); Hagan v. Rogers, 570 F.3d 146 (3rd Cir. 2009); Boriboune v. Berge, 391 F.3d 852 (7th Cir. 2004).
[131] Erin Kandel, *Joining Behind Bars: Reconciling Federal Rule of Civil Procedure 20(A)(1) with the Prison Litigation Reform Act*, 85 ST. JOHN'S L. REV. 755, 758 (2011).
[132] *Id*.
[133] *Id*.
[134] Hubbard v. Haley, 262 F.3d 1194 (11th Cir. 2001).
[135] *Id*. at 1196.
[136] *Id*. at 1197-1198.
[137] *Id*. at 1198.

requiring joined plaintiffs to pay full fees or how this scheme would be preferable to the same plaintiffs filing their cases separately.[138] Given that the Eleventh Circuit seemed to presume that such cases are generally frivolous, it does not follow that increased individual cases would be desirable.

Meanwhile, the Third and Seventh Circuits allow the joinder of *in forma pauperis* prisoner plaintiffs if the plaintiffs pay full filing fees.[139] In *Boriboune v. Berge*, the Seventh Circuit acknowledged that joinder could present some issues, such as if "prisoners who have struck out under § 1915(g) and thus must prepay all filing fees unless 'under imminent danger of serious physical injury'. . . hope to tag along on a joint complaint."[140] Even so, the PLRA did not supersede Rule 20; the PLRA does not refer to Rule 20.[141] The Seventh Circuit saw no irreconcilable conflict between the two and declined to repeal Rule 20 by implication.[142] The Seventh Circuit noted that joint litigation also presented potential costs to prisoners, as any dismissed claims could potentially count as strikes for every plaintiff.[143] Recognizing the Eleventh Circuit's concerns about applying the person-specific fee system of the PLRA to joint litigation, the Seventh Circuit argued that "[t]hese difficulties vanish if we take § 1915(b)(1) at face value and hold that one price of forma pauperis status is each prisoner's responsibility to pay the full fee in installments (or in advance, if § 1915(g) applies), no matter how many other plaintiffs join the complaint."[144] Likewise, the Third Circuit stated that there was no justification

[138] The Eleventh Circuit does not discuss the possibility of requiring each joined plaintiff to pay a full filing fee or whether such plaintiffs would then attempt to file individually. The decision rests on Congress's intent to deter prisoner litigation and its chosen tool of full filing fees. *See id*.
[139] Hagan v. Rogers, 570 F.3d 146 (3rd Cir. 2009); Boriboune v. Berge, 391 F.3d 852 (7th Cir. 2004).
[140] 391 F.3d at 854 (citation omitted).
[141] 391 F.3d at 854.
[142] 391 F.3d at 854.
[143] 391 F.3d at 855.
[144] 391 F.3d at 856.

for a categorical bar because the plain language of the statute does not refer to Rule 20, so there is no reason to disregard the Rule's unambiguous language.[145]

The Sixth Circuit authorized both joinder of plaintiffs and collective filing fee for such plaintiffs.[146] It articulated that because the statute does not address the apportionment of fees in cases with multiple plaintiffs, "each prisoner should be proportionally liable for any fees and costs that may be assessed."[147] Arguably, this approach is most consistent with the PLRA's statutory scheme, the statute's text, statutory interpretation of both the PLRA and Rule 20, legislative history, and, most significantly, the rights at stake in this determination.[148]

### *C. Heck v. Humphrey* and Interpreting the Three Strike Provision

The arguments justifying the PLRA centered around the idea that prisoner complaints were inherently frivolous.[149] Prisoners liked filing complaints while in prison because they had nothing better to do.[150] However, one category of claims now considered a strike by some circuits under the PLRA is not intentionally frivolous: *Heck*-barred claims.[151]

The purpose of the three-strike provision was to prevent litigants from filing more lawsuits after their "meritless" claims were dismissed, but the Supreme Court already required dismissal of a certain type of claim under *Heck v. Humphrey*.[152] Roy Heck was convicted of voluntary manslaughter and attempted to recover damages under § 1983 for an "unlawful,

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[145] 570 F.3d at 152.
[146] *In re* Prison Litigation Reform Act, 105 F.3d 1131 (6th Circuit, 1997).
[147] 105 F.3d at 1137-1138.
[148] Mani S. Walia, *The PLRA and Rule 20 in Harmony: Apportioning a Single Fee for Multiple Indigent Prisoners When They Proceed Jointly*, 58 DRAKE L. REV. 541, 544-545 (2010).
[149] *See* 141 Cong. Rec. at S7526 (May 25, 1995) (statement of Senator Kyl) ("Most inmate lawsuits are meritless. Courts have complained about the abundance of such cases. Filing frivolous civil rights lawsuits has become a recreational activity for long-term residents of our prisons.").
[150] *See Id*.
[151] The Ninth Circuit defines frivolous cases as having no defensible basis in fact. Andrews v. King, 398 F.3d 1113, 1121 (9th Cir. 2005). Courts dismiss *Heck*-barred cases because of their relationship to criminal convictions, not because the facts of the case have no defensible basis. 512 U.S. at 478-479.
[152] *Heck*, 512 U.S. at 478-479.

unreasonable, and arbitrary investigation" with his criminal conviction still pending.[153] To recover damages for a § 1983 case, the Supreme Court ruled that plaintiffs must prove that their conviction or sentence was reversed on direct appeal, otherwise expunged, or challenged by a federal court issuing a writ of habeas corpus.[154] The Court intended to prevent collateral attacks on criminal convictions—its new rule required prior criminal proceedings to end "in favor of the accused" so that no plaintiff could prevail in a tort suit while still being convicted of the underlying criminal prosecution.[155] This upheld the "strong judicial policy" against having multiple ongoing cases arising out of the same transaction.[156]

Because courts must dismiss civil lawsuits improperly challenging a criminal conviction under *Heck*, courts must determine whether such dismissals qualify as strikes under the PLRA.[157] The question has serious implications for who can bring prisoner suits, and circuits disagree about whether these cases constitute "failure to state a claim" and therefore warrant a strike.[158] While the Seventh and Ninth Circuits view failure to state a claim as a judgment on the content of pleadings, the Third Circuit interprets the language liberally, and perhaps more literally, as a determination about whether relief can be granted for the claim *in the moment*.[159] Accordingly, the Third Circuit automatically awards strikes based on *Heck* dismissals, but the Seventh and Ninth Circuits do not.[160]

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[153] 512 U.S. at 478-479.
[154] 512 U.S. at 478-479.
[155] 512 U.S. at 484.
[156] 512 U.S. at 484.
[157] *See* 17 F.4th at 423-424.
[158] *Compare* Washington v. Los Angeles County Sheriff's Dept., 833 F.3d 1048 (9th Cir. 2016); Polzin v. Gage, 636 F.3d 834, 837 (7th Cir. 2011); O'Brien v. Town of Bellingham, 943 F.3d 514, 529 (1st Cir. 2019); Harrigan v. Metro Dade Police Dep't Station #4, 977 F.3d 1185, 1191 n.4 (11th Cir. 2020) *with* Hastings v. City of Fort Myers, 2021 U.S. App. LEXIS 30023 No. 21-11220-F (11th Cir. 2021); Garrett v. Murphy, 17 F.4th 419, 423 (3rd Cir. 2021).
[159] *Id*.
[160] Although the First and Eleventh Circuits have also addressed this question, the circuits have not fleshed out their reasoning. The First asserts that the question is a jurisdictional issue. O'Brien v. Town of Bellingham, 943 F.3d 514, 529 (1st Cir. 2019) (holding that the excessive force claim the plaintiff raised

Because the Seventh and Ninth Circuits determine that plaintiffs fail to state a claim when the plaintiffs fail to meet pleading requirements, the circuits do not designate a *Heck*-barred claim as a pleading failure.[161] Instead, the Seventh and Ninth Circuits characterize the *Heck* requirement as an affirmative defense.[162] Therefore, in the Ninth Circuit, "a dismissal may constitute a PLRA strike for failure to state a claim when *Heck*'s bar to relief is obvious from the face of the complaint, and the entirety of the complaint is dismissed for a qualifying reason under the PLRA," but *Heck* dismissals cannot be considered categorically frivolous.[163] Plaintiff may create a timing issue by presenting meritorious claims before successfully challenging criminal convictions, and such claims cannot be categorically considered dismissals for failure to state a claim under FRCP 12(b)(6).[164] Although *Heck* requires favorable termination, that is not a necessary element to a civil damages claim under § 1983 in the statute's text, so failing to plead favorable termination is not failure to state a claim.[165] Just as prisoner plaintiffs are not required to prove administrative exhaustion in their pleading, but defendants can raise a plaintiff's failure to exhaust as an affirmative defense, *Heck* compliance is an affirmative defense rather than a pleading requirement.[166] A dismissal under *Heck* does not determine the underlying merits of the

related to his arrest was interrelated to his criminal convictions and therefore barred by Heck). The Eleventh Circuit also initially held that Heck was a jurisdictional issue, later argued "The Supreme Court's own language suggests that Heck deprives the plaintiff of a cause of action—not that it deprives a court of jurisdiction," and then declared the question "open." *Compare* Harrigan v. Metro Dade Police Dep't Station #4, 977 F.3d 1185, 1191 n.4 (11th Cir. 2020) *with* Teagan v. City of McDonough, 949 F.3d 670, 677 (11th Cir. 2020); Hastings v. City of Fort Myers, 2021 U.S. App. LEXIS 30023 No. 21-11220-F (11th Cir. 2021).

[161] *See* Washington v. Los Angeles County Sheriff's Dept., 833 F.3d 1048 (9th Cir. 2016); Polzin v. Gage, 636 F.3d 834, 837 (7th Cir. 2011).

[162] *See* Washington v. Los Angeles County Sheriff's Dept., 833 F.3d 1048 (9th Cir. 2016); Polzin v. Gage, 636 F.3d 834, 837 (7th Cir. 2011).

[163] 833 F.3d at 1055.

[164] 833 F.3d at 1056.

[165] 833 F.3d at 1056.

[166] 833 F.3d at 1056.

case.[167] Meanwhile, the Seventh Circuit held that rather than determining whether *Heck* applies, district courts should address the merits of the case.[168]

Unlike the Seventh and Ninth Circuits, the Third Circuit recently held in *Garrett v. Murphy* that a plaintiff does not fail to state a claim only by not meeting pleading requirements.[169] Courts that dismiss suits for failing to meet the favorable termination requirement of *Heck* dismiss due to a lack of a valid "cause of action" under § 1983; "claim" under the PLRA is synonymous with "cause of action."[170] The Third Circuit noted that the tort of malicious prosecution, the basis for the Supreme Court's holding in *Heck*, requires favorable termination as an element of the claim.[171] Similarly, therefore, favorable termination is "an implied element of a [§ 1983] claim," so a dismissal for failure to state a claim constitutes a strike under the PLRA.[172] Furthermore, the Third Circuit distinguished *Heck*-barred claims from failure to state a claim under 12(b)(6) because its precent required court to dismiss *Heck*-barred claims *sua sponte* for lack of subject-matter jurisdiction at any point during litigation.[173] Moreover, the court rejected the affirmative defense approach adopted by the Ninth Circuit by asserting that favorable termination is not an exhaustion defense; the Supreme Court did not require defendants to prove the validity of a conviction in their pleadings in *Heck*.[174]

[167] 833 F.3d at 1056.
[168] Polzin v. Gage, 636 F.3d 834, 837 (7th Cir. 2011).
[169] 17 F.4th at 427
[170] 17 F.4th at 427.
[171] 17 F.4th at 428.
[172] 17 F.4th at 428-429.
[173] 17 F.4th at 428.
[174] 17 F.4th at 429 (citing 512 U.S. at 483-487).

## Applicant Details

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## Applicant Education

| | |
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| Date of BA/BS | **May 2018** |
| JD/LLB From | **Duke University School of Law**<br>**https://law.duke.edu/career/** |
| Date of JD/LLB | **May 12, 2024** |
| LLM From | **Duke University School of Law** |
| Date of LLM | **May 12, 2024** |
| Class Rank | **School does not rank** |
| Law Review/Journal | **Yes** |
| Journal(s) | **Duke Journal of Comparative & International Law** |
| Moot Court Experience | **No** |

## Bar Admission

## Prior Judicial Experience

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June 12, 2023

The Honorable Jamar K. Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to express my interest in a clerkship position for the 2024-25 term or any term thereafter. I am a rising third-year law student at Duke Law School. I expect to receive my J.D. and LL.M. in International and Comparative Law in May of 2024 and will be available to clerk any time after that date.

Through my experiences before and during law school, I gained the legal research, writing, communication, and time management skills necessary to be an effective clerk. Before law school, I served as the Program Specialist for the Federal Judicial Center's International Judicial Relations Office. In this position, I worked with judges and legal professionals from the U.S. and around the world to plan and execute judicial education exchanges and technical assistance projects. I also researched, wrote, and edited content for a microsite aimed at familiarizing U.S. judges with civil and hybrid law jurisdictions. Last summer, I continued to develop my analytical skills at the Constitutional Court of Hungary.

Currently, I serve as a research assistant to Professor Laurence R. Helfer, an Article Editor for the *Duke Journal of Comparative and International Law*, and a student fellow for the Bolch Judicial Institute's *Judicature* publication. In these roles, I have conducted research, written memoranda on discrete issues, and provided editorial support. This summer, my work for Professor Helfer includes supporting his work as a member of the U.N. Human Rights Committee, reviewing State party reports. Additionally, as a teaching assistant for my school's international LL.M. writing course, I prepared the sample research memorandum for the Fall 2022 semester and taught more than 80 students how to use the Bluebook citation style.

Enclosed are copies of my resume, transcripts, writing sample, and letters of recommendation from Professor Laurence R. Helfer, Professor Samuel W. Buell, and General Charles J. Dunlap, Jr. Please contact me if you need any additional information. Thank you for your consideration.

Sincerely,
Tatiana Varanko

# TATIANA VARANKO

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## EDUCATION

**Duke University School of Law**, Durham, NC
*Juris Doctor/Master of Laws (LLM) in International and Comparative Law* expected, May 2024

| | |
|---|---|
| GPA: | 3.67 |
| *Summer Institute:* | Duke-Leiden Institute in Global and Transnational Law, The Hague, Netherlands |
| *Activities:* | Duke Journal of Comparative and International Law, *Articles Editor* |
| | Duke Law Innocence Project, *Active Investigations Team Lead* |
| | Duke Afghan Asylum Project, *Student Volunteer*, Spring 2022 |
| *Academic-Year Work:* | Bolch Judicial Institute/Judicature, *Student Fellow* (international rule of law) |
| | Professor Laurence R. Helfer, *Research Assistant* (international law & human rights) |
| | Professor Rima Idzelis, *Teaching Assistant* (LLM legal analysis, research & writing) |

**The George Washington University**, Washington, DC
Bachelor of Arts in International Affairs (Concentration: Conflict Resolution), Minor in French Language, Literature & Culture, *cum laude*, May 2018

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| GPA: | 3.55 |
| *Study Abroad:* | IES Abroad, Rabat, Morocco, Spring 2017 |
| *Academic-Year Work:* | National Archives and Records Administration, *Archival Aide*, 2016 –2018 |
| | GWU Office of Alumni Relations, *Colonial Connections Caller*, 2015 –2016 |
| | Office of Congresswoman Elizabeth Esty (D-CT), *Intern*, Fall 2015 |
| | Peace Corps Office of Diversity and National Outreach, *Intern,* Spring 2015 |

## EXPERIENCE

**Shearman & Sterling**, New York, NY
*Summer Associate*, May 2023 – July 2023

- Rotating through Litigation and Compensation, Governance, and ERISA practice groups.
- Working on a pro bono internal investigation related to the sexual abuse of a minor.
- Working on a pro bono project related to post-conflict justice in Ukraine.

**Constitutional Court of Hungary**, Budapest, Hungary
*Legal Intern, Presidential Cabinet*, May 2022 – June 2022

- Wrote summaries of fundamental rights cases from constitutional courts in Central Europe for a forthcoming inter-constitutional court database.
- Analyzed cases where the Hungarian Constitutional Court referenced European or international law to create a proposal for a subject-area-specific section of the inter-constitutional court database.

**Federal Judicial Center**, Washington, DC
*Program Specialist, International Judicial Relations Office*, January 2019 – August 2021

- Worked closely with IJRO Director (Mira Gur-Arie) and US judges on judicial education exchanges.
- Collaborated with US government agencies, international institutions, and partner judiciaries to implement international technical assistance projects.
- Oversaw fellowship program for foreign judges and lawyers researching areas of law or judicial practice relevant to reforms underway in their home countries and provided research support.
- Researched international rule of law and transnational litigation for web-based resources.
- Drafted all IJRO reports to the Judicial Conference and FJC Board.
- Managed ambassador and foreign representative visits for Justice Ruth Bader Ginsburg lying in repose at the Supreme Court of the United States.

**Society of Industrial and Office Realtors**, Washington, DC
*Membership Coordinator*, June 2018 – January 2019

- Provided guidance and resources to over 3,200 members across 36 countries.
- Drafted Member News and Chapter News content for the association's quarterly magazine.

## ADDITIONAL INFORMATION

Worked two summers as a school custodian. Enjoys Orangetheory, collecting records, and learning Arabic.

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## UNOFFICIAL TRANSCRIPT
## DUKE UNIVERSITY SCHOOL OF LAW

### 2021 FALL TERM

| COURSE TITLE | PROFESSOR | GRADE | CREDITS |
|---|---|---|---|
| Contracts | Haagen, P. | 4.0 | 4.50 |
| Civil Procedure | Miller, D. | 3.4 | 4.50 |
| Torts | Coleman, D. | 3.3 | 4.50 |
| Legal Analysis, Research, Writing | Rich, R. | *Credit Only* | 0.00 |

### 2022 WINTERSESSION

| COURSE TITLE | PROFESSOR | GRADE | CREDITS |
|---|---|---|---|
| Legal and Policy Aspects of Civil-Military Relations | Dunlap, C. | *Credit Only* | 0.50 |
| Life or Death: The Decision-Making Process in a Death Penalty Case | McAuliffe, M. | *Credit Only* | 0.50 |

### 2022 SPRING TERM

| COURSE TITLE | PROFESSOR | GRADE | CREDITS |
|---|---|---|---|
| International Law | Helfer, L. | 4.0 | 3.00 |
| Legal Analysis, Research, Writing | Rich, R. | 4.0 | 4.00 |
| International Research Methods | McArthur, M. | 3.6 | 1.00 |
| Criminal Law | Beale, S. | 3.3 | 4.50 |
| Constitutional Law | Blocher, J. | 3.2 | 4.50 |

### 2022 DUKE-LEIDEN INSTITUTE IN GLOBAL AND TRANSNATIONAL LAW

| COURSE TITLE | PROFESSOR | GRADE | CREDITS |
|---|---|---|---|
| Authority and Legitimacy in International Adjudication | Helfer, L. and Stahn, C. | 3.8 | 2.00 |
| Realizing Rights: Strategic Human Rights Litigation and Advocacy | Duffy, H. and Huckerby, J. | 3.8 | 2.00 |
| Comparative Perspectives on Criminal Justice: Central Issues and Contextual Implementation | Coleman, J. and Ölcer, P. | 3.5 | 2.00 |